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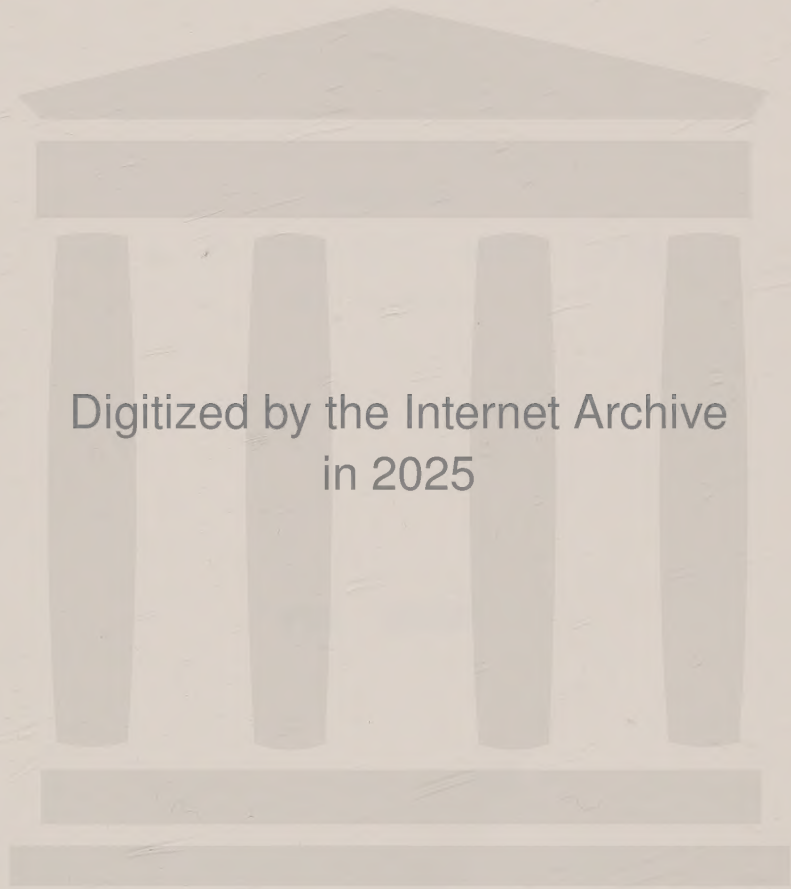

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THE

LAW QUARTERLY REVIEW

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VOL. XLIII.

LONDON:

STEVENS & SONS, LIMITED.

1927.

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

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THE

LAW QUARTERLY REVIEW.

No. CLXIX. January, 1927.

NOTES.

In the present year, 1927, we shall be celebrating an occasion of outstanding and sentimental interest to the legal profession. On March 12, 1677, was enacted the famous Statute of Frauds, 29 Ch. 2, c. iii, so that it has now attained its two hundred and fiftieth anniversary. Perhaps it is not inopportune to suggest that a dinner in its honour be given in one of the Inns of Court. A suitable number of litigants, who have been cheated of their rights by means of this interesting and aged Statute, might be invited to give relish to the affair. If some of the defendants who have sheltered themselves behind its useful provisions are also asked, care will have to be taken that none of the silver disappears. The toasts of the evening will be 'The Law—may it never be reformed' and 'Floreat iniustitia.'

This is not the first reference to the Statute of Frauds in our pages. The inaugural article of Volume I, written by Mr. Justice Stephen, was an attack on section 17 of the Statute of Frauds, substantially re-enacted in the Sale of Goods Act, 1893. Although his remarks were concerned with that section in particular, they apply with equal force to most of section 4. 'The special peculiarity of the seventeenth section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word. In some cases, no doubt, this may protect an honest man against perjury. In others it may enable a man to give judgment in

his own favour, that a contract into which he entered, it may be improvidently, is inequitable and ought not to be carried out, but in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality.'

Not only is the Statute unjust, but it is also uncertain. 'It is universally admitted, that no enactment of any legislature ever became the subject of so much litigation' (Smith's 'Law of Contracts,' p. 38, quoted by Leake in 'Transactions of the Juridical Society,' Vol. I, p. 271). Year after year new points arise, and even in 1926 judgments on the interpretation of words written two hundred and fifty years ago have been reported. 'Can any one,' continues Mr. Justice Stephen, 'look at what has been written upon the subject without feeling some indignation at the waste of time, labour, and money, which has been incurred in solving a problem which may be thus stated? "If the authors of the Statute of Frauds had ever considered the foolish question now before the Court (which it is morally certain they never did), what view are we to guess that they would have taken upon it, our guess being guided by certain artificial rules of construction, the application of which probably vitiates the result arrived at—which result, however, is not of the least importance?" . . . I speak, perhaps, with excusable warmth upon this subject, because I have devoted a great deal of time which might have been better employed to this piece of morbid anatomy.'

Nearly thirty years later, in Vol. xxix of this Review, at p. 247, an editorial note said: 'Has it ever occurred to upholders of this piece of antiquated legislation that in 1677 the defendant could not give evidence on his own behalf, and that the protection which the Statute conferred upon him is not called for at the present day? We would also add that £10 in the time of Charles II had a different monetary value from that which it bore in 1893, when another section was slavishly re-enacted.'

It would be a work of supererogation to refer to the great number of adverse criticisms which have been expressed, both by eminent Judges and by text-book authorities, on this statute, especially within the past fifty years. Perhaps we may quote Professor Holdsworth ('History of English Law,' Vol. vi, p. 396), who cannot be accused of harbouring iconoclastic intentions against the law: 'The prevailing feeling both in the legal and the commercial world is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of

place amid the changed legal and commercial conditions of to-day. This is clearly the last phase.'

Lord Nottingham, who prided himself upon being primarily responsible for the statute, said that 'every line was worth a subsidy' ('Lives of the Norths,' i. 141). Lord St. Leonards' comment on this remark is well known, 'Every line of it has cost a subsidy'—a subsidy paid by honest men to the fraudulent. The Lord Chancellor who—we hope in the near future—succeeds in having the Statute of Frauds repealed will have as much reason to congratulate himself on his work as Lord Nottingham had when it was first enacted.

The unanimous declaration of the Imperial Conference as to the relation of Great Britain and the Dominions to each other and to the Crown is a capital document in our public law: not because it lays down anything new, but, on the contrary, because it affirms with authority the practice which is already established. For one thing, the dream of a formal constitution for the British Empire, a dream entertained by an able though not numerous school of publicists down to quite recent years, is finally dismissed. Our Commonwealth of nations is not a federal state, nor even a confederation. On the other hand, it is more than an alliance, for the very reason that the bond is less definite than the terms of treaty obligations.

Well, a carping critic may say, And what is your bond? Allegiance to the King, you tell me? He is constitutional king of seven autonomous and all but independent States. And what is there to prevent his Ministers at Ottawa, say, and at Canberra, from giving him conflicting advice?—The answer is that in form there is nothing: in fact there is the common tradition of our laws and government, and the recognized need of continuous, though not yet organised, co-operation. 'Personal contact' is no new shift; it lies at the root of half our domestic business. Let us remember that to this day the letter of the law knows nothing of the Cabinet except that there is now an officially-named Prime Minister. Not that an Imperial Cabinet is practicable any more than an Imperial Senate. But we have at home a Government, that of the English Bar, carried on by four independent authorities, the Inns of Court, under a rather vague supreme authority of the Judges and with nothing to compel agreement beyond the fear of disruption. Disagreement is in fact extremely rare, and a peculiar system of co-operation, which

on paper would look unworkable to any one not acquainted with our professional tradition, works on the whole quite smoothly.

F. P.

Those who disapprove of fixed rules for the construction of documents of any given class have cause to rejoice at the decision of the House of Lords in *United States Shipping Board* v. *Strick* [1926] A. C. 545; 95 L. J. K. B. 776; for there can be little doubt that the rule in *Leonis S.S. Co.* v. *Rank* [1908] 1, K. B. 499; 77 L. J. K. B. 224 has received a severe shock. The earlier case decided, in the words of the headnote, that 'where the place named in the Charterparty as the place of loading is a port or other wide district . . . the lay days begin when the ship is ready and at the freighter's disposal within the named place in its commercial sense, though she may not be in a position to take in or discharge cargo and though she may not be at the wharf, dock or other part of the place to which the Charterers may have properly required her to go.' The majority of the House of Lords in the later case appear in substance to have held that the insertion of the words 'in regular turn' in the clause—a peculiarly ill-worded one—providing the rate at which the loading was to be done sufficed to indicate an intention that this rule of construction should not apply, and that time should not begin to run until the ship's turn at her berth had arrived. The implications of this view are pointed out in the dissenting speech of Lord Sumner, in which Lord Haldane concurred, and the cogency of which it is difficult to resist; in strict logic, the rule in *Leonis S.S. Co.* v. *Rank* (*supra*) would, as a working principle, be rendered wholly unreliable. Inasmuch however as the majority speeches expressly approve *Leonis S.S. Co.* v. *Rank* (*supra*), probably the Courts will restrict the effect of the later case to the attribution of a semi-sacramental efficiency to the actual words 'in regular turn,' thus at any rate minimizing the uncertainty arising from the decision.

What is the nature of demurrage, and what is the exact legal effect of demurrage clauses in charterparties? This question, which earlier authorities have on the whole served to vex rather than elucidate, is carried at least one stage nearer final solution by the case of *Aktieselskabet Reidar* v. *Arcos*, before Greer J. [1926] 2 K. B. 83 and the Court of Appeal (42 T. L. R. 736). There a charterparty provided that the ship should load a 'full

and complete cargo' and proceed therewith to a British port, 'cargo to be loaded at' a given rate per day and 'should the steamer be detained beyond the time stipulated as above the loading . . . demurrage shall be paid at £25 per day.' The charterers failed to load at the stipulated rate and consequently the ship started too late to arrive in England in time to enter lawfully a British port with a summer load. She was thus only able to carry a winter load, and it was held that the shipowners were entitled to recover, in addition to the demurrage, dead-freight on the difference. The reasoning of Greer J., in substance adopted by Sargant L.J. in the Court of Appeal, was that there were two distinct obligations on the charterer, viz.: (a) a primary obligation to load a full and complete cargo and (b) a secondary obligation to do so within the time limited: that a full and complete cargo meant what would be a full and complete cargo had the charterer performed his secondary obligation to load within the time allowed him; that the charterer had thus been guilty of two separate breaches of contract; and that though the damages for the breach of the secondary obligation (to load within the time limited) were conclusively quantified and limited by the demurrage clause, the damages for the breach of the primary obligation were not affected thereby. Bankes L.J. reached the same result by rather a different route. In his view there had been no breach of the primary obligation since the time for ascertaining whether a full and complete cargo had been loaded must be the time when the vessel sailed. The charterer, however, by failing to fulfill his secondary obligation had caused the owners a loss of freight amounting to the difference between the freights on a winter and summer load. These damages were recoverable because the demurrage clause merely quantified the damages for the detention of the vessel and left intact the right to any further damages which might flow from the failure to load in the agreed time. Both these views fit in neatly with the authorities which lay down the proposition that the shipowner cannot sail away at the expiry of the lay days: for although the charterers are by then in breach, 'their obligations in this respect' *i.e.* as to loading within the time limited 'are not of the essence of the contract, and . . , some unpunctuality . . . will not entitle the owners to treat the contract as repudiated.' It is not, in other words, until the charterers have repudiated their primary obligation that the shipowner is entitled to sail away: and though of course such a repudiation may be established ultimately by the charterers' delay in performing it, merely that the lay days have been exceeded is not enough. The suggestion

of Atkin L.J. that the reason why the shipowner cannot sail away at the expiration of the lay days is that he is bound to give the charterers an opportunity of mitigating his (the shipowner's) damages, seems less happy. If the freight market had gone up sufficiently to make it pay the shipowner to jettison his dead-freight altogether and load other cargo, would he then, it has been pertinently asked, be entitled to sail away?

It remains to be observed that all the learned Judges expressly recognize the possibility of a charter so worded that the charterer would not be in a breach at all at the conclusion of the lay-days, the days on demurrage in such a charter being, in the words of Lord Trayner in *Lilley* v. *Stevenson*, 22 Rettie 278 at p. 289, 'just lay days but lay days which have to be paid for.' In such a case, demurrage would not be liquidated damages at all, but rather an agreed extra remuneration to the shipowner in the nature of freight. The distinction is in certain states of fact of considerable practical importance, *e.g.* if during the demurrage days, the voyage became illegal.

The recent case of *The St. George* [1926] P. 217; 95 L. J. P. 181, is deserving of notice, not only on account of the rarity nowadays of an action of bottomry, but also for the legal issues which were raised. It arose, in the words of the President, 'out of an ocean adventure uncommon in its character, mode of prosecution, and incidents.' In 1923 the Scientific Expeditionary Research Association registered a private company for the acquisition of a yacht for expeditionary cruises, and a three-masted barquentine with auxiliary engines, the *St. George*, was purchased and fitted out. The contemplated itinerary included Panama, the Galapagos, Easter Island, Tahiti, and the Marquesas. Subscriptions were obtained from scientists, and a Mr. Gates became guarantor for £25,000 advanced by a London bank. As security for the guarantee, Mr. Gates took from the company a mortgage of the yacht. The *St. George* sailed in April, 1924, with some half-dozen passengers and three directors of the company, one of them, Major Douglas, being registered as the managing owner. While the vessel was still at Balboa, Panama, the company was at the end of its resources. Accordingly the directors on board and the master borrowed from a passenger, Mr. Grant, £200, and subsequently a further £250. Mr. Grant had never heard of bottomry, and lent the money without security. Later, the board in London cabled to

the master to get £3,000 on bottomry, and advised him that this course had been advised by their solicitor. Loans on bottomry having been suggested, Major Douglas agreed to advance £2,000, and Mr. Grant a further £550, to enable the ship to sail on her long voyage to the islands in the South Pacific. Major Douglas' loans were made on the promise that they should be secured on a bottomry bond. Mr. Grant lent the £550 'after a statement had been made to him that if he advanced these sums he would be given a bottomry bond for £1,000 to cover the sum total of his loans at Balboa.'

The master executed bottomry bonds for £2,000 and £1,000 in favour of Major Douglas and Mr. Grant respectively, and on the return of the *St. George* to England in September, 1925, after her voyage of over 30,000 miles, they claimed on the bonds. The company did not contest the claims; but the legal personal representative of Mr. Gates intervened, and alleged that the bonds were invalid, the main ground being that the mortgagee had had no notice of the intended hypothecation, and that no bond which impaired his security could be given without his authority, having regard to the provision in section 34 of the Merchant Shipping Act, 1894, that a mortgagor shall not be deemed to have ceased to be the owner of a mortgaged ship, except as far as may be necessary for making the ship available as a security for the mortgage debt.

The unusual facts, however, raised other curious subsidiary points. Was the expedition a commercial adventure or a pleasure cruise, which there was no 'necessity' to prosecute further? Could Major Douglas, as managing owner, take a bottomry bond in favour of himself? Could the earlier loans, which were not made on terms of bottomry, afterwards be secured on bottomry bonds?

Except on one point the President decided the issues in favour of the plaintiffs. Section 34 does not prevent a ship from being made the subject of a bottomry bond, nor is the consent of the mortgagee a pre-requisite of such a hypothecation. Where practicable, however, the lender on bottomry ought to see that the mortgagee has notice of the necessity for hypothecation before obtaining the bond. Besides the carriage of passengers, the company had money-making aims in respect of possible sales, exhibitions of films, taxidermy, and other occupations which gave the undertaking the character of a commercial adventure, and the President held accordingly that there was necessity to take the ship on or bring her home. Major Douglas' statutory position did not vest the property in the ship in him, and he was, in

the circumstances, a capable lender on bottomry. The inclusion in the bond of his two advances was in accordance with an arrangement made with the master, and to the extent that those advances were expended on necessaries (a portion of them went to pay insurance premiums and office expenses) the vessel could be deemed to stand charge on bottomry in the plaintiff's favour. As regards Mr. Grant, he had neither stipulated that his earlier advances should be included in his bond, nor had he made the further advance conditional thereon, and accordingly his bond could only be held valid security for the later loan.

The report of a decision on a somewhat archaic form of action may seem of little practical utility, but enough has been said to show that, apart from the unusual character of the adventure, some interesting points of law were involved.

E. C. M. T.

In *France, Fenwick & Co.* v. *The King*, 43 T. L. R. 18, Wright J. had to consider the right of the subject to compensation against the Crown for interference with his property. An Emergency Regulation, No. 9 (1), gave the Board of Trade or any other Government Department power 'to make orders regulating, restricting or giving directions with respect to . . . the terms and conditions on which the traffic is to be carried on, the ports at which cargo is to be loaded or discharged . . . (including directions requiring ships to proceed to specified ports for the purpose of loading or unloading cargo . . .) and other matters affecting shipping where it appears to the Department necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country . . .' But no compensation was made payable by the Regulations for injury sustained as the result of operations under this Regulation. During the stoppage of work at the coal mines in 1921 the suppliants' steamer *Lockwood* carrying a cargo of coal lay in the Thames from April 2 to 21 under orders from a Customs officer (apparently given under Regulation 9 (1) quoted above) not to discharge her cargo without permission. On April 21 the Board of Trade requisitioned her cargo, and the discharge was completed on April 23. The suppliants claimed compensation for her detention for the whole period April 2 to 23; the learned Judge awarded £100 as compensation for two days only, April 22 and 23. His judgment is based on the wording of another Emergency Regulation (No. 25) making 'compensation payable in respect of any property which is requisitioned or of which possession is

taken under these Regulations,' which, he held, superseded any common law right; 'requisition' meant 'some effective and positive dominion or control constituted by a definite order given under the Regulations,' and no such order was given under the Regulations until April 21. A mere direction not to discharge did not amount to a 'requisition,' and there was no 'requisition' until April 21. It seems to have been given on April 21 and to have operated on April 22.

But the suppliants' common law rights also came under discussion, and upon this topic a few words may be said. If the Emergency Regulation, No. 25, quoted above only applied to the two days, April 22 and 23, the common law rights to compensation were not superseded as to the period April 2 to 21. What is the suppliants' position in respect of that period? Has the subject any common law right to compensation from the Crown for interference by it with his property which does not amount to a taking? The suppliants' common law claim does not appear to have been seriously argued, as their counsel preferred to rest the case upon the Emergency Regulations and to endeavour to demonstrate that the direction not to discharge amounted to a 'requisition.' It is suggested that the short answer to their claim at common law is that the wrong, if any, alleged to have been committed on behalf of the Crown does not fall within the scope of a petition of right, and that, therefore, there is no other way in which the Crown can be adjudged to be liable for it. Petition of right lies for the recovery of land, goods, or money taken by the Crown, or for compensation for such taking. Here there was no taking of property until the requisition on April 22, merely interference with the use and enjoyment of it. The wrong, if any, committed before the date of the requisition resembles the tort of conversion, and it is believed that there is no recorded instance of a petition of right lying for damages for conversion or for any other tort (Robertson, 'Civil Proceedings by and against the Crown,' pp. 350 *et seq.*).

The question of policy involved is another matter. In the United States of America it is, we believe, held that legislation or executive action which compels railways to operate at unremunerative rates amounts to confiscation. Upon the whole matter of the rights of the Crown against the subject, to which much attention has been directed during the past decade, we might refer to Scott and Hildesley—*The Case of Requisitions* (the De Keyser's Hotel Case), a valuable article by Professor Holdsworth on 'The Power of the Crown to Requisition British

Ships in a National Emergency' in this REVIEW in January, 1919 (vol. xxxv, pp. 12—42), and the Report of the Committee of the International Law Association upon the Protection of Private Property discussed at Vienna in August, 1926, and shortly to be published. It is not unlikely that similar cases have arisen during the present year.

A. D. McN.

It is probable that *Booth* v. *Amalgamated Marine Workers' Union* [1926] Ch. 904 will be frequently cited when the proposed changes in the law relating to trade unions are under discussion. The main point of law involved—whether the registration of an amalgamated trade union is final and precludes an enquiry into the validity of the steps taken to bring about the amalgamation—is not of general interest. But the uncontradicted evidence as to the taking of trade union ballots and the general cost of administration is astounding. Apparently no check was kept on the voters when the question of amalgamation was referred to the members of the trade union, for in one case a branch secretary filled in two hundred ballots himself. Nor was an accurate list kept of the members of the union; whether this was due to carelessness or was intentional does not appear. Of even greater interest is the state of the accounts. 'So far as I can gather,' says Mr. Justice Tomlin at p. 919, 'from the accounts, the expenditure of the defendant union for the year 1922 was just under £42,000, and was made up roughly as follows: about £1,860 on depreciation; about £9,600 on expenses other than salaries; over £27,000 on salaries, &c. of head office officials, including president, secretaries and other officials, office staff, including income tax on salaries, the National Insurance, and about £3,500 in various forms of benefit to members. In other words, it cost about £38,500 to distribute £3,500 worth of benefit among the members.'

It is not suggested that in other trade unions similar conditions prevail, but what is of importance is that at the present time there is no legal machinery by which the ordinary members of such a body can prevent the wastage of their funds. Mr. Justice Tomlin found that 'the government of the union seems to have been in the hands of a body called the National Executive Council or Committee, over which the members had little, if any, control.' This is probably true of the organisation of most trade unions, so that their leaders are virtually autocratic. Nor can the ordinary member appeal to the Court for help, except in certain

special cases, as long as section 4 of the Trade Union Act, 1871, remains unchanged.

A question of considerable importance in the law relating to bills of exchange has been settled by the House of Lords in *R. E. Jones, Lim.* v. *Waring and Gillow, Lim.* [1926] A. C. 670; 95 L. J. K. B. 913. Is the original payee of a cheque who takes for value and in good faith a 'holder in due course'? This point had never previously been definitely before the Courts for decision although in two cases there were *dicta* on the subject. In *Lewis* v. *Clay* [1897] 67 L. J. Q. B. 224, Lord Russell of Killowen assumed, without giving any reasons, that an original payee was not a 'holder in due course.' In *Lloyds Bank* v. *Cooke* [1907] 1 K. B. 794, Fletcher Moulton L.J. reached the opposite conclusion. He pointed out that before the Bills of Exchange Act, 1882, such a payee would have been in the position of a holder in due course, and that there was a strong presumption against any serious change in the law. Moreover, the wording of the Act seemed to him to be perfectly clear. Section 29, sub-section 1 provides, *inter alia*, that a holder in due course is a holder to whom a bill has been 'negotiated.' Section 31, sub-section 1 provides that 'a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.' As a payee to whom a bill had been transferred would be the holder of the bill it must be held to have been 'negotiated' to him. Chalmers, on p. 105 of his 'Bills of Exchange,' adopted this argument. It is strange that neither he nor Fletcher Moulton L.J. referred to sub-section 3 of section 31 which provides that 'A bill payable to order is negotiated by the indorsement of the holder completed by delivery.' This seems to render the whole argument as to the meaning of 'negotiated' fruitless, as it clearly provides the only method by which a bill payable to order can be negotiated. On this ground the House of Lords unanimously held that the original payee of a bill is not a 'holder in due course.'

Lack of space prevents our considering in this number the further question raised in this case as to the nature of the action for the recovery of money paid under a mistake of fact.

Letang v. *Ottawa Electric Railway Co.* [1926] A. C. 728; 95 L. J. P. C. 153, is one more illustration of the well-established rule that the maxim *volenti non fit injuria* is not a defence if the plaintiff did not know the full extent and nature of the risk. The facts in the case are simple. The plaintiff's wife slipped on certain ice-covered steps on the defendants' property and was injured. The defendants did not argue that the steps were reasonably safe, but relied on the maxim *volenti non fit injuria*. The Board found that there was no evidence that she had full knowledge of the danger.

With these facts in mind, we find some difficulty in seeing the relevancy of the statement on p. 730 that 'It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*,' and the quotation from Bowen L.J. in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, that 'Knowledge is not a conclusive defence in itself.' These unimpeachable propositions are of importance when the question is whether a plaintiff, who understood all the risk involved, thereby impliedly accepted the risk. But in the present case the question to be determined was the entirely different one of whether or not the plaintiff's wife had realised the risk involved. In *Yarmouth* v. *France*, 19 Q. B. D. 647, Lord Esher, M.R. said: 'I see nothing in the decision in *Thomas* v. *Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.' There are thus two questions involved in these cases: (a) did the plaintiff have full knowledge? and (b) if this is answered in the affirmative, did he impliedly agree to incur the risk? If (a) is answered in the negative then (b) does not arise.

It is not our practice to comment on unreported cases, but in *Tomkins* v. *Coates, Times Newspaper*, July 21, 1926, the facts are of interest as furnishing an excellent illustration of a principle in the law of libel. The plaintiffs who were estate agents, had for some years acted as agents for the defendant, but their relations had come to an end. Subsequently the defendant placed in the garden of his house two large boards containing a notice that the house was for disposal. At the bottom of each board there was a further notice that the plaintiffs 'are not agents for this house.' The plaintiffs thereupon claimed

damages for libel. Mr. Justice Horridge held that the words were not actionable.

The plaintiffs relied upon the dictum by Lord Selborne in *Capital and Counties Bank* v. *Henty* (1882) 7 H. L. C., p. 747. 'If it had been publicly placarded by the defendants on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document; but nothing of that kind was done.' These words must not be interpreted as meaning that malice and intention to injure will make words libellous which otherwise would not be so. It is true that in determining whether words are libellous it may, under certain circumstances, be necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made. (Lord Halsbury in *Nevill* v. *Fine Art and General Insurance Co.* [1897] A. C., at p. 72.) But if the words cannot under any circumstances be construed as being libellous, then the fact that they are repeated to the world at large is irrelevant. Malice is material only where the words are libellous, and the defence is that the occasion was privileged. As Lord Bramwell said in *Capital and Counties Bank* v. *Henty, supra*: 'If they had such right, it seems to me that their motive is immaterial, and that they might do what they did, though out of anger or malice.'

Although the notice in the present case was probably meant to be insulting, mere insult does not amount to defamation. 'Defamation is a false statement or suggestion of fact to the prejudice of a man's reputation; insult consists in words or conduct offensive to a man's dignity, but involving no false statement or suggestion.' (Salmond, Torts, 6th ed., p. 498.) In the present case, as Mr. Justice Horridge pointed out, the words complained of were true. Nor was it enough for the plaintiffs to say that the words *might* be understood in a defamatory sense by some person or other. (Lord Halsbury in the *Nevill* case, *supra*, [1897] A. C. at p. 68.)

The inconvenience arising from the statutory employment of technical terms not defined either by statute or judicial decision is exemplified by the case of *Re Llanover Settled Estates* [1926] Ch. 626; 95 L. J. Ch. 419. The case depended upon the decision of three points upon the following facts. Under a decision in 1903 a testatrix's direction to accumulate rents was void and subject to certain incumbrances such rents passed to the heir-at-law until a named grand-daughter had a daughter. In a later case arising on the same settlement (*Re Llanover* [1907] 1 Ch. 635; 76 L. J. Ch. 427) it was held that the heir-at-law was not a tenant for life under the Settled Land Act, 1882, s. 58, as she did not take under an express trust. Upon appeal a compromise was sanctioned by the Court that the heir-at-law should have the powers of a tenant for life over one-fourth of the estate.

Two of the questions that came in issue were (a) whether the 'resulting trust' under which the heir-at-law took was an 'implied or constructive' trust within the Settled Land Act, 1925, s. 117, which would be included in the Settled Land Act, 1925, s. 58, sub-s. 1 (viii), and so conferred the powers of a tenant for life, and (b) whether the compromise entered into in the former case above cited prevented the section from applying to this particular case.

Astbury J. held that the answer to (a) was in the affirmative, but (b) the personal representatives of the deceased heir-at-law were not entitled to exercise the powers of a tenant for life owing to the compromise sanctioned by the Court by virtue of the Settled Land Act, 1925, s. 118, which provides that: 'Subject as aforesaid this Act shall not affect the validity of anything done or any order made or directions given by the Court before the commencement of the Act.' The result of this finding was that the trustees of the settlement therefore were statutory owners under the Settled Land Act, 1925, s. 23, and in consequence must execute a vesting instrument in themselves as statutory owners under the Second Schedule, para. 2 of the Settled Land Act.

The reasoning to arrive at the result is not uninteresting, since it will be observed that it virtually has the effect of compromising a right which had not arisen and could not be in contemplation of the parties. The retrospective action of the Settled Land Act, 1925, s. 118, therefore, is to nullify the executive provisions of the Act where there has been a judicial compromise, while not, perhaps, in the case where an agreement had been reached extrajudicially—*sed quære* whether the

construction of the section is 'anything done . . . by the Court.'

The most interesting point, however, is that indicated in the first sentence of this note. Astbury J. was asked to decide whether the resulting trust was an 'implied or constructive trust' and in argument the only authorities cited were three modern textbooks, to wit: 'Lewin on Trusts,' 'Wolstenholme's Statutes,' and 'Underhill's Trusts.' The learned Judge did not accept the definitions in any of them though he referred to them as 'substantially accurate.' Nor did he decide whether the resulting trust was an implied trust or a constructive trust, but held that it was 'within the general meaning of an implied or constructive trust.' He did, however, differentiate between the resulting trust in issue 'construed by the Court in the trustees of the income which they so hold and which they cannot apply in accordance with any express trust in the settlement,' and a resulting trust arising where the trusts of a will or settlement do not exhaust the property therein contained. In other words the learned judge has classified resulting trusts into two classes and held that at least one of them is an 'implied or constructive' trust. The other class depends upon the implied intention of the settlor, and 'Underhill on Trusts' (8th edit.), pp. 9 and 10, suggests, though apparently without authority, that such a trust is really express. Such a construction would render 'implied' and 'constructive' alternative expressions, if implied trusts are not a species of the genus 'express' trust as, indeed, the learned author seems to regard them. Such a view as that of the learned author would render the inclusion of the word 'implied' in the definition clause of the Settled Land Act (s. 117 (xii)) at least misleading. It is, however, submitted that an 'implied' trust can properly be distinguished from an express trust upon the authority of *dicta* in judgments such as that of James L.J. in *Merchant Taylors' Co.* v. *Attorney-General*, 6 Ch. 512, itself referred to in 'Underhill on Trusts,' at p. 149.

The definitions of counsel in this case of an 'implied' and 'constructive' trust were summed up by the learned judge in the following words: 'An implied trust means a trust declared by a party not directly but by implication . . . a constructive trust is a trust which the Court elicits by a construction put upon certain acts of the parties as for instance where a trustee renews a lease belonging to the trust in his own name.' It was this view which was not wholly acceptable. It is submitted that if, indeed, it was exhaustive the resulting trust would

hardly be either implied or constructive since it depended upon an omission to do what it is conceived was manifestly intended, namely, to exhaust the trust fund upon the declared trusts. Furthermore, it seems only necessary to declare an intention when it is proposed to confer an interest upon some person other than the grantor. It is suggested that, perhaps, the more correct view might have been that an implied trust simply arises where there is an implied intention that the trustees shall hold for the benefit of some persons, possibly the settlor, while a constructive trust arises by operation of equity where, from the position of the parties, a Court of equity would hold that one was in a fiduciary relation to the other. This has an analogy in the law of contract and though analogies are proverbially dangerous does definitely cover legal relations with peculiar characteristics which it is convenient so to express. Whereas to treat resulting trusts as a fourth species or genus of trusts is misleading and inaccurate since it properly falls under one of the other heads.

H. P.

Re Leigh's Settled Estates [1926] Ch. 853; 95 L. J. Ch. 511, arose upon the construction of the words 'binding trust for sale,' which it is conceived may give rise to further litigation. The difficulty was due to the existence of a compound settlement under which property subject to an annuity was held upon trust for sale. The decision was given prior to the Law of Property (Amendment) Act, 1926, enabling such annuity to be overridden by trustees for sale being appointed by the Court or being a trust corporation. Under the Settled Land Act, 1925, s. 20, the person entitled to the income of land held on an immediate binding trust for sale is not a tenant for life for the purposes of the Act.

The learned judge (Tomlin J.) found difficulty in construing the language of the Act on the ground that the word 'binding' appeared to be superfluous since it was described as immediate and therefore must take effect at once, and that express provision was made (Law of Property Act, s. 205, sub-s. 1 (xxix)) for the case to cover the necessity for consent to exercise the trust for sale. It is conceived that he might have been further embarrassed had he been referred to the description 'effectual trust for sale' contained in the Administration of Estates Act, 1925, s. 39, sub-s. 1 (ii), although that Act (section 55 (xxvii)) contains the same definition of trust for sale as in the Law of Property Act. The learned judge held that 'binding' must therefore be construed to mean that the trust for sale was

capable of binding the whole subject-matter of the settlement and since in the particular case it was incapable of being exercised so as to override the rentcharge, the trust for sale was not binding. The ground for his decision was that the word 'binding' was capable of another meaning if it was not to be treated as a superfluity which, being incorporated in a statute, could not be the case. A similar decision on the word 'effectual' referred to above might lead to interesting results.

Although the Settled Land Act, 1882, s. 63, was referred to during the case as showing the former position of a trust for sale in connection with settled land, no attention was apparently paid to *Re Horne's Settled Estate*, 39 Ch. D. 84, deciding that the trust for sale must be immediate, or to *Re Goodall's Settlement* [1909] 1 Ch. 440, where it was held that a trust for sale which might never arise, *e.g.* because it was to be exercised only on request, did not fall within the section. It would seem that the draftsman may well have had these cases in mind and given them statutory form, particularly when it might be observed that *Re Wagstaff's Settled Estates* [1909] 2 Ch. 201, decided that the necessity of consent from the tenant for life was immaterial. It is respectfully submitted that these three cases explain the definition of trust for sale given in the Law of Property Act, 1925, s. 205. Whether the care of the draftsman will ultimately result in more litigation than had he disregarded these cases might be an interesting, if unprofitable, speculation.

H. P.

Fielden v. *Byrne* [1926] Ch. 620; 95 L. J. Ch. 445, emphasises the danger of a policy of employing extra-judicial bodies to perform the functions of a law Court, particularly where exclusive jurisdiction is not conferred over the whole subject-matter. In this case the plaintiffs sought to enforce a restrictive covenant against the defendants who proposed to use a dwelling-house as a Catholic Secondary School for boys. The defendants admitted that they bought with knowledge of a restrictive covenant prohibiting such user. Between summons for directions and delivery of pleadings they applied under Law of Property Act, 1925, s. 84, sub-s. 9, to have proceedings stayed. Their claim was that this was a case contemplated by section 84, sub-section 1, and that, therefore, proceedings should be suspended pending application to the authority there mentioned, *i.e.* such one or more of the Official Arbitrators selected by the Reference Committee under the Acquisition of Land (Assessment of Com-

pensation) Act, 1919. Eve J. in granting the application, said that he found difficulty in determining the principles on which the jurisdiction to stay was to be exercised. The plea of the defendants was not an equitable defence which could be pleaded in the High Court, since modification of the covenant could be directed by the authority on grounds not recognized in equity. Hence, refusal to make the order would be tantamount to a ruling in favour of the plaintiffs' claim. In the circumstances he made the order, but directed that the costs should be costs in the action and ordered that the application to the authority should be prosecuted forthwith. This leaves open the question whether, if modification is granted, the plaintiffs must thereby lose the costs of the action.

The case is interesting from two points of view. In the event of undue delay on the part of the defendants to apply for relief it would appear that an order would be made refusing a stay of proceedings under section 84, sub-s. 9. This would probably result in judgment for the plaintiffs. Should the defendants later apply to the authority it would seem that it might make an order modifying or discharging the covenant which would then be enforceable under section 84, sub-section 5. It is submitted that the saving of the concurrent jurisdiction of the Court (section 14, sub-section 1) applies to the power to modify and not to its decrees against modification.

The second point is that this section seems to entail hardship on a plaintiff seeking to enforce the covenant. The authority has apparently no power to enforce the restrictive covenant so that, in order to raise the question before a tribunal capable of ordering it to be observed, the plaintiff must issue a writ. Yet he may be put to the additional trouble and expense of proceedings before another tribunal if the defendant applies to stay proceedings in the High Court. It would seem, however, from the judgment of Eve J. that if any defence in its nature equitable were to be raised it might be disposed of before reference was made to the authority—*sed quære*—for it is not clear what defences will be pleaded until delivery of the pleadings.

H. P.

The distinction between a statutory owner and a tenant for life or person with the powers of a tenant has received its first judicial recognition in the case of *Re Craven Settled Estates* [1926] Ch. 985; 95 L. J. Ch. 559. The Earl of Craven was not a person having the powers of a tenant for life under the Settled Land Act, 1925, s. 20, or a tenant for life under the Settled Land Act, 1925, s. 19, but was entitled to exercise the powers of a tenant for life under the Settled Land Act, 1925, s. 23. It was desired that he should release those powers in favour of the trustees of the settlement who could then exercise them under the same section. It was suggested to the Court that the alternative methods at his disposal were either an order of the Court under the Settled Land Act, 1925, s. 24, on the ground that he consented to it, or a release by deed, on the assumption that the Settled Land Act, 1925, s. 104, prohibiting such release or assignment did not apply to a statutory owner.

The first difficulty in the case was the definitive section (Settled Land Act, 1925, s. 197), to distinguish between statutory owner (xxvi), and tenant for life (xxviii), and the learned judge, Astbury J. held that the definition statutory owner applied to the cases covered by the Settled Land Act, 1925, s. 23, whereas tenant for life contemplated the provisions of the Settled Land Act, 1925, ss. 19, 20.

The learned Judge then held that there was a sufficient indication in the Act to show that there was an intention to distinguish between the tenant for life and the statutory owner, so that where the latter was not mentioned the section would apply only to the former except, of course, where the provisions were concerned with conferring powers upon the tenant for life. He, therefore, held that the Settled Land Act, 1925, s. 24, did not apply to a statutory owner and that the Court had no jurisdiction to make an order authorising the trustees of the settlement to exercise the powers of a tenant for life. However, he further held that since the Settled Land Act, 1925, s. 104, did not refer to a statutory owner such owner was not prohibited from releasing his powers. In support of this view he referred to section 107, which makes a tenant for life trustee for all parties under the settlement and expressly mentions a statutory owner. Curiously enough he did not refer to section 106 which also contains express mention of the statutory owner and is the corollary of section 104 since it prevents any provision inserted in the settlement being made to forbid the tenant for life exercising his powers.

The net result was that when the Earl of Craven released his powers as statutory owner under this decision the trustees of the settlement would then become statutory owner under the Settled Land Act, 1925, s. 23 (b).

In conclusion it might be added that the position of a statutory owner would therefore be analogous to that of a beneficiary with collateral powers. If he disposed of any beneficial interest he might have under the settlement he would still retain his collateral powers as tenant for life: *Alexander* v. *Wills*, L. R. 6 Ch. 124, but there is nothing to prevent him from releasing these powers though he cannot be deprived of them in advance: Settled Land Act, 1925, s. 107.

H. P.

R. v. *Haslewood, Ex parte Margerison* [1926] 2 K. B. 468; 95 L. J. K. B. 975. The Coroners Act, 1887, s. 4, provides that an inquest must be held *super visum corporis*, and at the first sitting of the inquest the coroner and jurors must view the body. In the above case the coroner, who was a solicitor, omitted to view the body, as he thought that no useful purpose would be served by it, he having no more medical knowledge than the jury who had already seen the body, and particularly as he had received a medical report. A Divisional Court (Hewart C.J., Avory and Salter JJ.), following *R.* v. *Ferrand* (1819) 3 B. & Ald. 360, ordered a new inquest, the former being held void—in fact it was no inquest. The Court may, however, dispense with the disturbance of 'John Brown's Body' on a second inquest (*ibid.* s. 6). It is somewhat anomalous that a coroner and his jury who may have no medical skill at all, must view the body; whereas a doctor, whose view of the body would be of real value, may issue a death certificate on mere hearsay evidence that a person whom he may not have seen for a considerable time has died.

T. E. L.

In *Richmond* v. *Savill* [1926] 2 K. B. 530; 95 L. J. K. B. 1042, the Court of Appeal considered the effect of a covenant to surrender.

Premises were let for a term of twenty-one years from Michaelmas, 1922. The tenant died, and her executor negotiated with the landlord's representative for a licence to sub-let, or for an immediate surrender of the lease. The landlord's representative, by letter, informed the executor that if he would agree to pay the rent up to March 25, 1925, and give up possession by the end of February, 1925, the landlord would be 'willing to release him.' The letter was accepted orally by the executor. The present action was brought by the landlord to recover damages for breaches of the covenants to repair, which had occurred before the date of the surrender. It was held that the release, though in general terms, must be read as limited to the matters which were in the contemplation of the parties at the time when the release was given, and therefore it did not release the tenant for breaches of the covenant committed before the date of the surrender. The decision is in accordance with well-established authority—*Att.-Gen.* v. *Cox* (1850) 3 H. L. C. 240. For the defendant reliance was placed on a passage in the judgment of Cotton L.J. in *Ex parte Allen* (1882) 20 Ch. D. 341, which seems to go to the full extent of saying, entirely contrary to the law up to that time, that if a lease is surrendered the whole of the tenant's liability on the covenants is wiped out. Atkin L.J., at p. 543, points out the importance of reading such language in connexion with the particular facts dealt with in the case cited. Very pertinent are the words of the Earl of Halsbury L.C., in *Quinn* v. *Leathem* [1901] A. C. 495, at p. 506: 'Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. . . . A case is only authority for what it actually decided.'

T. E. L.

With reference to the case of *In re Annesley*, noted in the October number (Vol. xlii, p. 435), and the New York decision there referred to, a learned American correspondent writes:—I have read with much interest the judgment of Mr. Justice Russell in *In re Annesley* [1926] Ch. 692. I observe in the footnote, on page 709, a query as to whether the New York decision referred to is reported elsewhere than in the *New York Law Journal*. You may, perhaps, like to know that this case is officially reported in the series known as the 'Miscellaneous Reports,' which contains the decisions of the various New York Courts inferior to the Appellate Division of the Supreme Court. The citation is '*Matter of Chandler*, 109 Misc. (N. Y.) 696.' The difference in the name of the case is due to the fact that in the official report the case is named with reference to the testator whose estate was in progress of settlement, whereas *Tallmadge* was the name of the executor whose account was under consideration.

It seems to have escaped the notice of the learned editors of the latest editions of 'Westlake' and 'Foote' that *Birtwhistle* v. *Vardill* (1835) 7 Cl. & F. 815, is probably no longer good law. A person born illegitimate but legitimated *per subsequens matrimonium* according to the law of Scotland could not inherit English land as the heir of his father, although for other purposes he was legitimate. The Statute of Merton, enacting and declaring the common law, 'requires something beyond mere legitimacy to make an heir to English real estate.' That something was birth in lawful wedlock: 'there must be legitimacy *sub modo*—legitimacy *and* being born in lawful wedlock.' On the other hand, it is settled law that for all other purposes a person born domiciled in a country where legitimation *per subsequens matrimonium* is permitted, of parents who subsequently married while domiciled in a country where such legitimation is also permitted, is legitimate. 'If a child is legitimate by the law of the country where at the time of its birth its parents were domiciled [and by the law of the country where the parents were domiciled when they married: *Vaucher* v. *Solicitor to Treasury* (1888) 40 Ch. D. 216] the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of domicil': *In re Goodman's Trusts*, 17 Ch. D. 266, 291, *per* Cotton L.J. Hence, for all purposes of status, including

succession to movables, he is legitimate. But 'according to the law of this country, there are certain rules and canons of the law of inheritance as to real estate, which, irrespectively of personal status, are annexed to the nature of real estate': *Re Don's Estate*, 4 Drew 194, 198, *per* Kindersley V.-C.

Such was the law in 1925: but by the Administration of Estates Act, 1925, s. 45, sub-s. 1, 'all existing modes, rules and canons of descent' are abolished. By section 46, sub-section 1, if a person dies intestate leaving issue but no husband or wife, his residuary estate 'shall be held on the statutory trusts for the issue of the intestate.' Issue, of course, means lawful issue. A legitimated person is lawful issue, but not, before 1926, for the purpose of succeeding to English land. The question is, therefore, whether the rule of *Birtwhistle* v. *Vardill* is one of the 'existing modes, rules and canons of descent.' It may be argued that the rules referred to in respect of the succession of children are the rules of primogeniture and coparcenary. The rule of *Birtwhistle* v. *Vardill*, it may be said, is a rule of status which, for feudal reasons, applies only to the succession of English land. It is not a rule of descent, but of capacity to take succession, and is therefore not touched by the Act. This subtlety, however, is not only unnecessary and valueless, but is contrary to the implications of several *dicta*. For instance, the *dictum* of Kindersley V.-C. quoted above; and in *In re Goodman's Trusts* (*ubi sup.*) James L.J. said, at p. 298: 'In that judgment, or advice [*i.e. Birtwhistle* v. *Vardill*] there are two distinct propositions clearly and distinctly enumerated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land.' In other words, the question as to status and the question as to succession are distinct, and, since the old rules as to succession have been abolished, *Birtwhistle* v. *Vardill* no longer holds good. The argument is somewhat strengthened by the fact that the general intention of the Act is to identify the rules as to personal and real estate. It should be noted, however, that a legitimated person will generally be the issue of persons not domiciled in England, so that in any case the succession to movables and to real estate in England would be determined according to different principles.

W. I. J.

SCOTTISH PRIZE CASES AND MODERN HERESIES.

IN the 'Yale Law Journal' for February, 1918, the present writer set out the gist of some sixty decisions of the old Scots Court of Admiralty, collated from various bulky collections of cases, and apparently entirely neglected by, if not unknown to, authors on the law of nations. They are very valuable, as they cover a crucial period for which there is only the scantiest English or other authority.

It is well worth recurring to these decisions, as they entirely confirm the established practice in prize cases, which is so cavalierly ignored at the present day. It must be remembered that the ancient rules of prize were established as a practical balance of equity between the belligerent and neutral, and that powerful States have never yet been asked to submit to the new practice, which only appears on any large scale as one of the dubious features of a world war.

Let us recapitulate the main features of the old practice, which the highest English authorities have deliberately styled the only conceivable mode of trial which is not 'manifestly unjust, absurd, and impracticable.'[1]

1. Captors' Evidence.

In the first place, *the evidence of captors was never admissible.* The ship was condemned 'out of her own mouth.' To avoid the reproach that the same Power was prosecutor, witness, and judge in its own cause, Sir James Marriott, himself an Admiralty judge, tells us in his 'Memoire Justificatif' the rule was firmly settled that the prize cause was to be decided on the evidence of the ship's own papers and the declarations made on oath by her own people in answer to certain fixed, but not invariable, interrogatories. These declarations were styled the *examination*

[1] Memorial on Prize Procedure (reprinted in the present writer's Prize Law and Continuous Voyage), by Sir G. Lee (judge of Admiralty), Sir G. Paul (Advocate-General), Sir J. Ryder (Attorney-General), and Sir W. Murray (Lord Mansfield) (Solicitor-General). Produced by Lord Stowell and Sir J. Nicholl to Chief Justice Jay as the highest authority on prize procedure, and accepted as such by the Supreme Court of the United States.

in praeparatorio, or the *preliminary examination*. So much weight being attached to the ship's papers, it was necessary to secure their credibility. This was done partly by allowing the captors great latitude in the search for papers—much greater than in meddling with cargo—and partly by the equally rigid principle that any discrepancy in the tale was fatal. If the papers were not full and complete—consignments in blank were not full and complete [2]—if they were thrown overboard or any attempt was made to make away with them, the Court was justified in proceeding to condemn; much more, if they varied in their account from the statements made by the master and crew or from each other. Not only the regular commercial papers, but every scrap of writing on board, could be invoked for the captors—even the private letters of passengers. Should there be any discrepancy between the papers, the preliminary examination, and the situation and course of the ship when captured, the case was ended, unless the Court accorded liberty to the claimants to explain the discrepancy away. This was called 'allowing further proof,' and it will be obvious that it was an indulgence never needed by captors at this stage—only by claimants.

This system of attaching conclusive weight to the evidence proceeding from the ship itself, whilst requiring it to be in the highest degree consistent and complete, furnished a reasonable answer to neutrals, who complained that the capturing State was judge in its own cause. At any rate, it was not witness in its own cause. 'Ex ore tuo,' as pious Sir James Marriott remarked, 'iudicaberis.' The almost insoluble conflict between belligerent claims and neutral rights was solved in a clean-cut and reasonable fashion. The belligerent was to be the judge, but the evidence was all to come from the neutral, and the variety of persons examined was a guarantee that among them, as Lord Stowell said, there would be one who would tell the truth, or at least that the evidence, if untrue, would fail to be consistent.

It must be remembered that violent interference with a friendly vessel, such as is implied in capture as prize, is, and was then felt to be, an invasion of the national flag which requires to be justified up to the hilt. The system which Lord Mansfield and his colleagues considered to be the only practical one secured for the neutral a cheap and speedy trial, which went far to excuse the interference. She was tried by the swift and summary

[2] *Vide The Abo*, 24 L. T. (o.s.) 5; *The Jonge Pieter*, 4 C. R. 79; *The Atlas*, 3 C. R. 299.

mode of examining her papers and putting thirty or forty stock questions to some of her people selected for examination. There was no question of long detention while evidence was being sought for in all quarters of the globe. There was no question of expensive witness trials. Unless there was something wrong with the summary proofs, the vessel was entitled to speedy release. She never could be kept in port while the captor and his solicitors got up a case against her. Still less did the neutral merchant have to deposit £150 before he could be heard to claim his goods. All was simple, swift, and cheap.

2. 'Bringing in for Examination.'

Nor was the captor allowed to detain the ship while he rummaged the cargo. Contrary to the opinion of a great many people, cargo never was rummaged at sea, comparatively easy as the operation might have been in the day of small ships. The breaking of bulk by captors was one of the worst spoliations of which the Court took cognizance. A captor who broke bulk had the Court against him at once.[3]

In *The Anna Maria*[4] captors were guilty of extreme violence in their search for papers. They broke open trunks and the like, but, so far as appears, they kept their hands sacredly off the cargo. It does not appear that in any single reported case the nature of the cargo, as ascertained by rummaging at sea, was ever invoked or relied on.

A corollary to this is that ships were never brought in 'for examination' (or, more accurately, in order that a case may be got up against them), because, if captors' evidence is excluded, the belligerent can make up his mind at sea whether he intends to capture or not. When he boards the ship and searches for papers, he ought to make up his mind. If he has reasonable grounds for capture, he will run no risk by effecting the capture. If he has no *a priori* grounds, but trusts to something turning up on the preliminary examination, he may take the risk or not, as he pleases; but he cannot avoid it, and send the ship in to await his pleasure at her own expense. To send her in is in effect to capture. This is made abundantly clear by

[3] See *The L'Eole* (1805) 6 C. R. 220, 225; *The Washington* (1806) *ibid.* 275; 280; *The Concordia* (1799) 2 *ibid.* 102; *The Sao Joao Baptista*, Inner Temple Folio Prize Appeals, formerly Dr. Lushington's (1800-1805) fo. 453. There is an apparent exception in *The Rosine*, 2 C. R. 372. But in that case the ship was not on the high seas, but in British jurisdiction. An officer of the Fife Light Dragoons ordered some boxes to be opened which were being laden on a cartel ship at Dover, and they were found to contain sheet tin. What a dragoon can do on Dover sands has no bearing on prize law.

[4] (1817) 2 Wheat. 327, 334.

Lord Stowell's judgment in *The Wilhelmsberg*.[5] There the captors had, indeed, commenced prize proceedings, and they desired to abandon them and release the ship, when it became clear that the suit would fail. This is an *a fortiori* case; it is much more arbitrary and oppressive to detain the ship without suit until the captor is satisfied he has sufficient evidence to go ahead. When he sends the ship in he captures, and he cannot escape the responsibilities of a captor by delaying to institute suit.[6]

'I cannot think,' says Sir William Scott in this case, 'that the neutral master acted in any way improperly, in declining such an offer [of release], being only told, to go about his business, and that he would hear no more of the matter. To release a vessel in this summary manner, without her consent, after she was once brought in, would be contrary to the directions of the Prize Act.'

The same doctrine was laid down in America.

'Before the captain of *The Nonsuch* left *The Anna Maria*,[7] in pursuit of other objects, he ought to have decided either to seize her as a prize or to restore her.'

Capture consists, not in any subjective intention, but in the assumption of control by the belligerent officer. As soon as he controls the vessel he captures, and is thenceforth responsible for the consequences.

Lord Lyons, H.B.M. Minister at Washington, wrote to Mr. Seward on April 22, 1863[8]:

'The habit of the United States cruisers of seizing vessels on the chance that something may possibly be discovered *ex post facto* which will prevent the captors being condemned to pay damages, renders the practical fulfilment of the obligations of a neutral State to respect the rights of a belligerent a matter of daily increasing difficulty.'

The boarding officer must make up his mind at once whether to capture or not. If he orders the vessel to port, he captures her. He cannot send her into port while he gets up a case *dehors* the papers. If he captures and takes prize proceedings, or has them brought against him by the ship, he can then have bulk broken and the cargo examined. But it must be done

[5] (1804) 5 C. R. 143.

[6] The proper course of the ship, in such a case, is to bring process in the Prize Court for release: and if the Court knows and attends to its duty, it will not delay the case while the captor is amassing the evidence which he ought not to be allowed to adduce.

[7] (1817) 2 Wheat. 327, 334.

[8] Dip. Corr. U. S. (1863) 511.

with all the securities of legal process. He cannot break bulk himself, nor can the Crown; it must be done by the impartial officers of the Court. For this purpose a commission of unlivery may be obtained,[9] and the cargo examined. But the belligerent must already have assumed the risks of effecting a capture. This unlivery and examination, illuminative as it may be, must all be effected at the risk of costs and damages. The examinations, utterly unprocessual, which were effected by naval officers during the late war at their own hand, would have horrified Lord Stowell, and called forth his severest reprobation.[10] They were all made in presumed analogy to the supposed former practice of overhauling the cargo at sea. No such practice existed. To open one barrel or package of cargo, the ship must have been formally captured, process must formally have been instituted, and the Court must have sent its own officer to conduct the examination.

3. The Scottish Cases.

Anyone can see that such a system worked simply, cheaply, and swiftly. That it was also efficient is apparent from the enormous number of condemnations which in fact proceeded. How it worked in detail can be seen by anyone who has the curiosity to examine the Folio Prize Appeals, formerly Dr. Lushington's, and now in the library of the Inner Temple.

It was a consistent, reasonable system, designed to give a maximum of safety and satisfaction to neutrals.[1] It is still the only legal system: for the regard evinced for law during the late war was admittedly not such as to command universal admiration and esteem. It was thrown away by England in 1914, when she laid down a revolutionary code of prize procedure and admitted wholesale captors' evidence.[2]

The Scottish cases (which cover a period for which there is very little English authority) entirely bear out our contention. In no single one was captors' evidence admitted, except as a reply to the occasional indulgence of 'further proof' extended to claimants. The sanctity of papers was preserved by the prin-

[9] Marriott, Memoire Justificatif, *ubi sup.*

[10] In *The Gertruyda*, 2 C. R. 213, the captors attempted a provisional detention, and wrote a letter stating that 'the goods are not to be considered as seized.' This was treated by the Court as wholly inoperative. 'It is impossible,' said Sir W. Scott, 'to suffer the mere expressions and style of the letter to alter the real consequences.'

[1] See *The Sarah* (1801), 3 C. R. 330, 331.

[2] See *Neglected Fundamentals of Prize Law*, 30 Yale Law Journal, November, 1920, p. 34. The Scots Courts long ago were more enlightened, and held in 1668 that a roving commission to seize ships where the cause of offence was not 'sensible to the eye' would be destructive of all neutral freedom (*infra*, p. 40); *Parkman* v. *Captain Allen*.

ciple that any spoliation or concealment of them was fatal to the neutral claimant. In *The White Dove*[3] it was said that 'the throwing of papers overboard is an unquestionable ground of prize.' In *The Bounder*[4] it was resolved: 'That absence of pass, spoliation of papers, or variations in testimony, be sufficient to condemn.' Spoliation of papers was a ground of condemnation in *The Golden Falcon*,[5] and it was relied on, though not held to be proved, in *The Fortune*.[6] In *Earl of Kincardine* v. *The St. Andrew*,[7] *The Palm Tree*,[8] *The Patience*,[8] *The White Horse*[9] and *The Margaret*,[9] concealment of papers contributed to the decree of condemnation. The sanctity of papers was further preserved by the treatment of discrepancies[1] as fatal: instances are found in the last quoted five cases, and also in *The Calmar*,[2] *The Bounder*,[3] *Simpson* v. *Ludke*,[4] *The St. Katherine* v. *The St. Mary*,[5] *The Venus*,[6] *The Live Day* (? *Livadia*),[7] *The Katherine*,[8] *The Pearl*,[9] *The Crown*.[1] The conclusiveness of the primary evidence is explained and affirmed in *The King David*,[2] *The Flying Hart*,[2] and *The Young Tobias*,[3] as well as in *Davidson* v. *Richardson*, where claimants were not allowed to contradict the statements made by the master ((1667) Dirleton, No. 49, p. 120), and *The Prince of East Friesland* (*infra*, p. 46): 'By the common law of nations, false documents, or no documents, make prize.'[4]

In *The Bounder*[5] it is stated that the general custom of all nations is to grant summary process, and to condemn or absolve within three tides of ebbing and flowing of the sea 'because that the goods and lading may suffer great prejudice by delay, and the skippers and sailors be at a great loss, being interrupted

[3] (1673) 2 Stair, 183, 213. 'Further proof' was, however, allowed as an indulgence.
[4] *Ibid.* 185, 207; cf. Gosford MS. 334.
[5] (1673) 2 Stair, 215.
[6] *Ibid.* 218.
[7] *Ibid.* 171.
[8] *Ibid.* 173.
[9] *Ibid.* 177.
[1] See, for a case of immaterial variance, *The St. Andrew* (1673) 2 Stair, 187, 216; *The Rostock*, *ibid.* 179.
[2] *Ibid.* 178.
[3] *Ubi sup.*
[4] (1673) 2 Stair, 162.
[5] *Ibid.* 191.
[6] *Ibid.* 196, 212.
[7] *Ibid.* 229. 'Further proof' was allowed as an indulgence, double sets of papers being practically necessary to deceive the enemy. See also *The Rostock*, *ibid.* 179; *Clark* v. *Smeiton* (1673), *infra*.
[8] 62 Dalrymple, 78; 2 Fountainhall, 271.
[9] 2 Stair, 220.
[1] *Ibid.* 160.
[2] *Ibid.* 207.
[3] *Ibid.* 208.
[4] *Clark* v. *Smeiton*, 2 Stair, 220.
[5] (1673) Gosford MS. p. 334.

in their voyages.' Really, they appear to have had more common-sense in 1673 than in 1925! In *The Seal Fish* [6] it is said that the Admiral is obliged by the general custom of nations to judge between two tides.

The well-known declarations of Phillimore and Story,[7] to the effect that there is nothing in common between the proceedings of common law and prize process, and that it is a great mistake to confound the two, are anticipated in Gosford's report (p. 334) of *The Bounder.* The Lords say there, that there is a great difference between the prize Court and the Lords of Session, who, before answer, might admit conjunct probations for trying matters of fact: whereas in the Court of Admiralty they have their instructions [presumably this means the preparatory evidence] and rules whereupon they may immediately proceed and determine on all points before them.

In short, we have the system precisely as it was understood throughout Europe from 1614 to 1914. Summary inspection of papers at sea: instant decision to capture or release immediately thereupon: subsequent trial on ship's papers and declarations alone. A cheap, effective, swift and simple procedure: fair to neutrals and satisfactory to belligerents. It was thrown away on August 5, 1914.[8] Probably it was illegally thrown away, even by English municipal law: for the Order in Council of August 5, 1914, was made under section 3 of the Prize Courts Act, 1894: and that section only empowers the Crown to regulate, and not unlawfully to revolutionize, the practice.

4. Neutral or Enemy Character.

Considerable light is thrown by these Scots cases on this very obscure question. We find the statement made in text-books that 'domicil,' not political allegiance, is the test of enemy character in prize; and we find authors endeavouring to distinguish this 'trade domicil' from ordinary civil domicil,

[6] (1673) 2 Stair, 281.

[7] See 2 Halleck, International Law, c. 32, § 20.

[8] It had been threatened by the American Civil War Cases. But (1) those cases were only three or four in number; (2) they were the decisions of a political Chief Justice, with his puisnes equally divided, and Justice Nelson, in the minority, has told us that they were the decisions of judges who were 'no exception to the rule' that at that time 'the national feeling was deep and strong against England'; and (3) they were reprobated in the strongest terms by Hall and Twiss, nor did the British Government exclude them from the claims adjudicated on at Washington by arbitration. I would again refer the reader to Twiss's article in the Law Magazine (Continuous Voyages, vol. 3 (1877), p. 1), reprinted in the writer's Prize Law and Continuous Voyage (Stevens & Haynes, 1915).

and judges who evidently make no such distinction, but who quote prize cases as authorities on succession and marital cases and *vice versa*.[9] We find, further, another criterion of enemy character, in the fact of the possession of an enemy 'house of trade'; and Professor Westlake very successfully entangled this conception with that of 'domicil,' to the utter confusion of the topic. In the 'American Journal of International Law' for April, 1921 (xv, 2, p. 198), I endeavoured to disentangle the complicated knot.[1] But as Lord Justice Scrutton has repeated with some approval in a careful and elaborate opinion[2] what I take to be one of the fallacies current on the point, I venture to invoke the Scots cases in support of my considered views.

(1) *Allegiance.*—I take it that, first of all, enemy allegiance is the prime test of enemy character. Enemy persons who enjoy an express, or tacit, licence,[3] to remain undisturbed in the realm, or to carry on trade undisturbed, of course must have the protection of the licence (though in the last war it was inferred on very insufficient grounds—to shut a German up in prison by no means amounts to a licence to remain, such as was promised to Louis XIV's Huguenot subjects in England and thereby formed the foundation of *Wells* v. *Williams*[4]). But I know of no case in which a Frenchman (for example), settled and trading in Hamburg or Oporto, was held to be a friend for purposes of prize.

Now there is a *dictum* of counsel in the Scottish cases, which is diametrically opposed to this view of mine; and, for what it is worth, it tells strongly in favour of the friendly character (for prize purposes) of enemies domiciled *dehors* the enemy country.

'Neither is, nor was, there any ground of prize because the seaman is or was by nation a Hollander, unless he was an actual residenter there and contributed to the war, which alone ["only"] makes him an enemy'—(*The Sun*: *Anderson* v. *Douglas*, Jan. 21, 1673; 2 Stair, 154).

The captor's counsel even go so far as to admit that if an enemy Hollander came to England and settled there, that change of domicil, *flagrante bello*, would be enough to deprive him of the enemy character. It was, in their view, unnecessary to

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[9] *Udny* v. *Udny* (1869) 1 S. & D. App. 441; *Forbes* v. *Forbes* (1854) Kay, 341; *Craigie* v. *Lewin* (1843) 3 Curt. 435; *Att.-Gen.* v. *Kent* (1862) 1 H. & C. 12; *Munro* (1840) 7 Cl. & F. 862; *Maltass* v. *Maltass* (1844) 1 Robertson, 67; *The Francis*, 8 Cranch, 363; *Johnson*, 3 Peters, 171; Phillimore, Law of Domicil, 13.

[1] See also Baty & Morgan, War and Its Legal Results, pp. 310, *et seq.*

[2] See *Tingley* v. *Müller* (1917) 2 C. 173.

[3] As to necessity of licence, see *Alciator* v. *Smith* (1812) 3 Camp. 245; *Alcinous* v. *Nigreu* (1854) 4 E. & B. 217.

[4] (9 Gul. III) Ld. Raym. 532.

invoke the King's proclamation inviting them to come and promising them the protection of subjects.[5] It was sufficient that they came. It would be a mistake, however, to rely on this *dictum*. In the Anglo-Swedish Treaty of 1661 the Swedes are allowed to use Dutch skippers, if they become domiciled in Sweden. If domicil in Sweden made a man a Swede, for prize purposes, this would have been an absurd and superfluous stipulation.

In this matter I first find myself constrained to part company with Lord Justice Scrutton. His Lordship observes, after laying down the principle that allegiance was originally the test, and explaining the qualification that was introduced, conceding a friendly character to enemies who remained in England by licence, that the same tenderness was extended to enemies who 'traded or resided' in a neutral country. I cannot find any instance in which a person whose allegiance was to the enemy was regarded as a neutral merely because he 'resided or traded' in a neutral country; though Sir L. Jenkins may have been willing to admit that twenty years' neutral domicil might have that effect. (See his 'Life,' p. 730).[6] Counsel's *dictum* in *The Sun* stands alone. And, note, that it says nothing about trading. It is residence and contribution to the war that is the important thing. It is a *dictum* only pronounced *arguendo*, and is contradicted by the Swedish Treaty, which implies that for purposes of prize law a Dutchman remains a Dutchman, though domiciled in Sweden. And it is contradicted by Lord Davey's statement in *Janson* v. *Driefontein Consolidated Mines* that an alien enemy (for purposes of trade) is in principle 'a person owing allegiance to a Government at war with the King.' Lord Justice Scrutton himself regards allegiance as in principle the proper test, and as ready at any moment to revive if domicil prove inadequate to decide any given case.[7]

(a) *Domicil.* (b) *House of Trade.*

(2) But, if the Scots cases, so far as they go—and it is obviously not very far—tend to support the position that domicil is decisive, even for a person who is a member of the enemy nation, and invests such an alien with the character of a

[5] Cf. *Wells* v. *Williams*, *ut supra*.

[6] English people domiciled in a neutral country were permitted, like their neighbours, to trade with the enemy: *The Danous*, 4 C. R. 255*n*. But that is quite a different thing. In the United States *The S. José Indiano* extended the principle to an enemy Englishman domiciled in neutral Spain. This was never imitated in England, or (I imagine) followed in America.

[7] *Tingley* v. *Müller*, *supra*.

subject or a friend, for purposes of prize, they lend no support whatever to the odd idea that the domicil intended is a sort of Pickwickian domicil, totally different from the familiar domicil which is the 'criterion of the personal statute.'

Westlake invented (or adopted from Dr. Lushington) [8] what he called a 'trade domicil' for which there is no support whatever in the cases: and which appears to rest on a confusion between the heads of (1) Domicil and (2) House of Trade. Domicil, for purposes of prize, was, according to him, the prolonged residence usual in a course of personal trading in a given country. I have examined this position in great detail elsewhere [9]; it is enough to say here, that the most eminent judges have treated domicil for purposes of prize and domicil for civil-law purposes as one and the same thing. Having a house of trade in a country is an entirely different matter, and one quite independent of personal residence. The Scots cases—like the English cases up to the twentieth century—show no such distinction as Westlake imagines, between ordinary domicil and prize domicil. In *Ewart Loyson* v. *Laird of Ludquharn and Captain Wilson* (June 15, 1669), a born Dutchman was admitted to prove a Spanish Netherland domicil. He failed to do it: as he only proved that in 1667 he had taken a house in Brussels and begun to set up there, and that 'some time before' he had lived with his mother in Ghent. This would seem to have been enough, or nearly enough, to satisfy Westlake's idea of 'trade domicil'—but the Court found it insufficient, because the claimant had not proved that it was his 'constant' (or permanent) domicil. And it was said that such Dutchmen 'being Hollanders at the beginning of the war, concurring and contributing to the war, even if they had truly removed *tempore belli*, they continued to be the King's enemies: much less can their taking houses elsewhere sufficiently prove that they totally deserted the Hollanders and concurred not with them in the war.'

This judicial *dictum*, it will be observed, goes far to support my position that political enemy allegiance is primarily decisive, even if a neutral domicil is taken up. Something amounting to a 'total desertion' and 'non-concurrence' is necessary: in other words, a repudiation of allegiance, such as would be

[8] See *The Baltica*, Spinks' Prize Cases, 264.

[9] See American Journal of International Law, *ubi sup.*, Journal of Comp. Legis. (1909), xix, 157, 265, xx, 183; 21 Juridical Review (Edin.), October, 1909, p. 209. Cf. Westlake, Private International Law, § 279; *ibidem*, International Law (2nd ed.), ii, 164. Professor Westlake disclaimed the idea that 'trade domicil' involved actual trading—but it is plain to any reader that his conception of the thing is inseparably bound up with trading in the country of the 'trade domicil,' though his language is more than usually elusive.

evinced by naturalization in foreign territory. But even if all that the judges mean is that a change of residence will not do—that there must be a permanent change of domicil—it is evident that the domicil contemplated must be of a very thorough and lasting character. It is the domicil of Private International Law: it is certainly not the slight and slender 'trade domicil' of Westlake. It is 'a total desertion.'

Unfortunately, Lushington and Westlake's novel invention of a 'trading domicil' was taken up by very eminent judges—Lord Justice Lindley and Lord Justice Scrutton.

The reason why domicil is a test of enemy character is totally independent of trading. Story, in *S. P. G.* v. *Wheeler* (1814), 2 Gall. 130, says—'It is not the private character or conduct of an individual which gives him the hostile or neutral character. *He may be retired from all business*, . . . engaged in works of charity, religion and humanity—and yet his domicil will prevail over the innocence and purity of his life.'[1] The goods of the person domiciled in the enemy's country are seized as lawful prize because, by his mere personal settlement in that territory, he is contributing, by his disbursements and by his taxes, to the support of the enemy State. He is a source of power to it by his very establishment within its borders. It is because he spends, that he is valuable to it. It is as a consumer that he is regarded. (See *The Harmony*, 2 C. R. 325.)

But a person whose goods are condemned because he has a house of trade in the enemy country is treated as an enemy because he assists the enemy as a producer. By his organization of industry, his exchange of its products as an exporter or importer, he benefits the country and he is a source of wealth to the enemy Government. This is a fact totally independent of the accidental circumstance of his personally residing there or not. And this identification, by business, with the enemy has never been called domicil until Lushington and Westlake, by an aberration of genius, appeared to label it so. Wheaton long ago indicated the two grounds of capture quite clearly. He did not advert to what I venture to think is a third ground—enemy allegiance. But he declares that the owner's domicil in an enemy country is a ground of capture (and he gives no hint that it is anything other than ordinary civil domicil): and he adds that the products of a house of trade in an enemy country are also open to capture.

[1] (1814) 8 Cranch, 132. Cf. also Wheaton, Captures, iv, 202-250; and the cases collected in Baty & Morgan, War and Its Legal Results, pp. 304 *et seq.*

He makes the curious statement that this is the result of the partiality of Prize Courts to captors—since the products of a house of trade established in a neutral country are not necessarily and always free. But, as Dana sensibly remarks, if they were to be free, the result would be to abolish domicil as a test of enemy character, and to substitute that of house of trade. The fact is, it is an additional test. Broadly stated, the position is that if the party is personally established in the enemy country, he supports it as a taxpayer and consumer: if he carries on business there, he supports it as a producer. In the one case his domicil condemns his goods, in the other his house of trade condemns them. To be free, he must be clear of both enemy connexions.

Lord Justice Lindley introduced, in *Janson* v. *Driefontein Consolidated Mines*,[2] the attractive but fallacious theory that in determining enemy character 'it is not the nationality of a person but his place of business during war that is important'; and this sweet simplicity has exercised its siren influence over succeeding judges and even over the Foreign Office. Simplicity is always attractive: but it can be purchased too dear.

Lord Justice Scrutton is by no means so simple. He sees, as Westlake and Lindley appear not to have seen, that residence is important, quite apart from trading, through the hold which the belligerent Power has over the person domiciled within its borders. Westlake and Lindley looked at his trading only. Lindley's definition is avowedly and exclusively limited to trading. Westlake's is more hazy and nebulous, but it as certainly regards the residence as being undertaken for trading purposes. The Court of Appeal in *Porter* v. *Freudenberg*[3] appear thoroughly confused. Commencing by saying 'It is clear law that the test for this purpose is not nationality but the place of carrying on business,' they proceed: 'A . . . subject . . . who is voluntarily *resident*, *or* who is carrying on business, in hostile territory, is to be regarded and treated as an alien enemy'—apparently the 'clear law' was not so clear as to mean what it said!

Wheaton could never have said that it was unjust to condemn a domiciled enemy's goods engaged in a house of trade established in a neutral country, if (as Lord Lindley would have it) they were *not* condemned, because 'the important thing is the place of business.' Nor could he (without imbecility) have stated a solemn objection that if you capture the products of an

[2] [1902] A. C. 484.
[3] [1915] 1 K. B. 867, *per* Reading, C.J.

enemy house of trade although the owner is not there attending to the business (and therefore is not domiciled there in Westlake's sense), you ought not to capture the products of a neutral house of trade when the owner is not personally there looking after it, but on the contrary is personally settled in the enemy country, attending to an enemy business there! It would have been too obvious that there was a great and unpardonable identification with the enemy of much the same complexion in both cases alike. If domicil is mere permanent residence, then Wheaton's objection is intelligible, though mistaken. The two things, trading and residence, are perfectly distinct. But if domicil normally means 'trading residence,' then Wheaton's objection becomes absurd: the distinction between trading and trading residence is altogether too fine to make the objection reasonable or tenable by anybody but a trader to Anticyra.

It is reasonable (though mistaken) to say: 'Choose either the residence of the man or the focus of the particular trade as your criterion, and stick to it.' That is what I understand Wheaton to have meant. It is feeble and unreasonable to say, 'If you choose the trading residence of the man as your primary criterion, you ought not to choose the focus of the particular trade as a secondary criterion.' Wheaton could never have meant that.[4]

Clearly, Lord Lindley's *dictum* was never intended to be a definition. Equally clearly, the Lushington-Westlake notion of domicil has no support in the authorities.[5]

Lord Justice Scrutton, on the other hand, quite rightly and properly, if it may so be said, does not insist on the necessity of trading in the country as a component of domicil, but states distinctly that due residence by itself is enough. Where the present writer ventures to think the Lord Justice goes too far is in distinguishing that residence, under the name of 'trade domicil,' from ordinary civil domicil. In the case before the Court[6] it was totally unnecessary. The defendant there had left England

[4] See *per* Sir W. Scott in *The Rendsborg*, 4 C. R. 139: 'Where the trade itself cannot claim to be considered [neutral], and is carried on from the enemy's country by agents representing the principals therein, it should seem that the mere personal residence of the principals elsewhere would hardly protect such a trade. . . .' Clearly he was contemplating domicil as 'mere personal residence,' having nothing to do with trade. And such, evidently, was Wheaton's conception, for he was criticizing Scott's decisions. Cf. Wildman, International Law, 45.

[5] It is sometimes assumed by modern supporters of the Westlake doctrine that in former days a trader was practically always resident in one of the places where he traded. But this was certainly not the case. Several reported cases turn on the position of merchants who lived in Danish territory while trading at Hamburg, or who lived in Holland while trading at Imperial Ostend; many turn on the position of travelling merchants. Consider *The Elisia*, Folio Prize Appeals, Inner Temple (1813-14), fo. 472. [6] *Tingley* v. *Müller*, [1917] 2 Ch. at p. 173.

during war, by a licence permitting him to go back to Germany, which appears to have been his domicil of origin. How could it be supposed that he retained his English civil domicil? The facts were on all fours with those in *The Indian Chief*[7]: the Lord Justice cites that case, and, singularly enough, cites its approval in *Udny* v. *Udny*,[8] which he omits to remark is a case of ordinary 'civil' domicil.

It is true that a hundred years ago a civil domicil could be acquired with much greater legal facility, and in a much shorter time, than it can be acquired now, in these days of universal travel and rapid communications. And something, though not much, might be said for the theory that the criterion of war domicil has remained what it was, whilst the criterion of civil domicil has been stiffened up. But such a theory has to reckon with Lord Westbury and *Udny* v. *Udny*, and not with that case alone.

That by 'domicil' the Scots authorities did not understand a sort of 'trader's residence,' as Westlake would have it, is clear from *The Calmar* (*supra*). In that case the national character of the master and part owner was ascertained from his domicil, and it is distinctly said that such a domicil must be single and unique. 'His true domicil could be but in one place, and was found to be in Holland,' where he lived at home with his mother at Hem.[9] A person may clearly have a 'trading residence' in several places: and in fact this shipmaster was a burgess of Calmar and traded from there. It was his purely personal, non-trading, domicil that was invoked to prove him Dutch—the familiar domicil of civil law. Just as we see in *Udny* v. *Udny*, the standard case on civil law domicil, cases such as *The Indian Chief* and *The Harmony* (both cases on prize-law domicil), cited and relied on by the Court, so in these Scots cases there is no hint of the idea of any distinction between the two. There may also be cited *The St. Katherine* v. *The St. Mary*[10]:—

'At one time a party may have many domicils, but his residence is estimated by his principal domicil, which is always understood when his wife and family are in his own house, unless there were evidences of their separation; for a skipper, who is ordinarily at sea, may have a chamber in many towns where he uses to trade; and though he had a part of his stock [there] and bore contribution for it, yet his chief residence must be where his wife and family were.'

[7] 3 C. R. 12. [8] L. R. 1 H. L. 441.

[9] A parellel case will be found in *The Elsingburgh* (or *The Elsingburgh Castle*) (1673) 2 Stair, 182, 216.

[10] (1673) 2 Stair, 191. See also *The Young Tobias* (1673) 2 Stair, 208.

This is conclusive against Westlake's 'Trade Domicil.' It is here expressly stated not to amount to the unique and principal domicil which is conclusive for prize purposes. In *The King David*[11] the same principal comes out very clearly. The skipper deposed that he was made a sworn burgess of Frederickstadt in Denmark in 1671—had a house there, and paid scot and lot, and had had his wife to stay with him there for some weeks. But his wife had since then remained in Dutch Emden. The Court brushed aside all the skipper's staying and trading in Frederickstadt—'because he did not transport his family': since upon such pretences 'the Hollanders might make themselves burgesses of any free place . . . when truly they had not changed their domicil or deserted the enemy, leaving their families there where it is presumed they did bear burden.' Nor, they add, could the captors be put to prove that the claimants did bear burden in Emden, it being an enemy's country, to which there was no safe access.

In short, the whole stress is laid on the support which a domiciled person gives to a country by making it his permanent personal habitation, and thus rendering himself subject to 'burdens' there. Trading and place of trading have nothing whatever to do with it.

Sir L. Jenkins, in a letter quoted by Phillimore ('International Law,' § 325), says quite plainly: 'Nay, which is more, in the case of Reprisals, if I live in Sweden, a Burgher, Officer, or what you please, and a Dane, for instance, hath Letters of Reprisal against the English nation, if my goods fall into the Dane's hands, they are lawful prize, though I be never so much habituated in Sweden; unless it proves, that I am so transplanted thither, *cum pannis*, that I have neither goods nor expect them in England, and have resolved never to return again thither; which is an exception that some learned men allow of, but not all: these things show that the quality of a natural-born subject is tied with such indissoluble bonds upon every man that he cannot untie all by any means.' ('Life of Sir Leoline Jenkins,' II, 713.)

From this it is clear that Jenkins knew nothing of a 'trade domicil' different from the domicil of civil law, but that he considered that only a domicil connoting an intention never to return to the country of his belligerent allegiance—and possibly not even that—would suffice to place a belligerent subject in the position of a neutral.

[11] (1673) 2 Stair, 219.

5. Continuous Voyage.

The modern extension of the doctrine of continuous voyages,[1] which amounts to a wholesale licence to establish paper blockades of neutral territory, found no countenance in *The Stavorse Lynbaan*.[2] The new principle of 'Free Ships, Free Goods' introduced by the Dutch Treaties of 1668, 1676, allowed the Dutch to carry French goods free from British capture. But the British saw with mixed feelings that British goods on Dutch ships were by no means exempt from French capture. It may have been in consequence of this that 'the rule of the war of 1756' was struck out, according to which French goods (and indeed all kinds of goods) could be captured on Dutch or other neutral ships engaged in what was before the outbreak of war a 'close trade' of the enemy, viz., colonial or coasting trade. A voyage from neutral Trondhjem to neutral Amsterdam was not a French colonial voyage—but in the case cited it was attempted to prove that the goods had first come from the French West Indies in pursuance of a design to take them to Amsterdam, and that 'it makes no difference whether a Dutch ship shall bring a cargo directly from the French West Indies to Amsterdam, or if the voyage shall be divided, and the cargo be brought to Trondhjem in order to be there reshipped or board a Dutch vessel.'

But the Court declined to accede to the argument. They thus took up the position adopted at first by Sir W. Scott,[3] that the importation at an intermediate port was a conclusive break in the voyage. (Even a direct voyage from a French colony (S. Domingo) to a Dutch port (the Texel) was treated as innocent in *Volkert Hendricks* v. *Wm. Cunningham* (1781)[4]—it is well known that the 'Rule of the War of 1756' was not applied in the war of 1778, nor until Scott revived it twenty years later).

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[1] See Rémy, La Théorie de Continuité du Voyage: Baty & Morgan, War and Its Legal Results, 368 *et seq.*; Atherley Jones, Commerce in War, 253; the writer's International Law in South Africa, ch. i; and Twiss in 3 Law Magazine, p. 1. Cf. especially Mountague Bernard, Neutral Rights, p. 316; and *The Will o' the Wisp*, British Parliamentary Papers (North America, 1863, No. 12), p. 10; also the writer's Continuous Voyage: the Present Position, in 9 Trans. Grotius Society.

[2] (1761) 4 Fol. Dec. 144; Fac. Col. No. 27, p. 54; 178 Kames, del. Dec. No. 178, p. 241.

[3] See The Portland Ministry and Continuous Voyage, 38 L. Q. R. (1922), 359.

[4] 4 Fol. Dec. 145; Fac. Col. No. 85, 141 (*The Catharina*). Lord Braxfield (Macqueen, 'Weir of Hermiston') was the judge. In the English case of *The Spazemheid*, 3 C. R. 42, 46, a clear ulterior destination to Ostend was disregarded by Sir W. Scott.

6. Swedish Treaties on Contraband.

It is too often forgotten (though Wheaton is very specific on the point) that the treaties are still perfectly valid which Sweden concluded with England in 1661, 1664 and 1665, creating a system of official certificates as to the nature and destination of cargo, which certificates (at any rate in a European war) were to be conclusive. England always did her best to avoid the effect[5] of these instruments, and for this purpose she employed the loopholes of—(1) challenging the certificates as false and fraudulent, if inaccurate in any detail; (2) relying on the employment of enemy crews by the Swede; (3) endeavouring to narrow the broad exemptions of the treaties. In *The Riga Castle*[6] and in *Peterson* v. *Anderson*[7] the Scots Court took the second line, and in the end it did the same in the more interesting case of *Parkman* v. *Captain Allen*.[8] In this latter case, although fraud was not alleged, the attempt was made by every means to narrow the scope of the treaties. It was argued especially that it did not apply to articles which were not native produce. On the other hand, the point was taken for the claimants that, altogether apart from the treaties, the stockfish which formed the bulk of the cargo was 'provisions'—and that provisions were only contraband when carried into a besieged place, or 'to those that could not subsist without them.' Although this may not have been stipulated in the treaties, it was relied upon as common law, 'according to the opinion of Grotius.'

The third line was taken, with royal approval, in *Parkman* v. *Captain Allen*.[9] Enlarging the terms of the treaties, the words *instrumenta bellica*, although they were mere general words, following an enumeration of weapons and the like, were held to include tar. On the contrary, five years later, the much more juridical conclusion was arrived at—that *instrumenta bellica* meant only things 'properly and only useful' for warlike purposes. If the articles are 'promiscuous, and such as may be fit for shipping or war, or other employments,' then they cannot be contraband[1]; and in *The St. Andrew* (*No.* 2)[2] the evident inclination of the Court was against comprehending pitch in the general words.

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[5] Cf. *The Maria* (1799) 1 C. R. 287, 340.
[6] (1667) 1 Stair, 481, 483, 484, 534.
[7] (1668) 1 Stair, 544.
[8] (1668) *ibid.* 502, 529, 550; Dirleton, No. 132, p. 55; No. 153, p. 61.
[9] (1668) 1 Stair, 502, 529, 559; Gosford MS. No. 27, p. 10; Dirleton, No. 132, p. 55; No. 153, p. 61.
[1] *The Bounder*, *supra*.
[2] (1673) 2 Stair, 187, 216.

In *Burnmaster* v. *Dishington*[3] the first course was taken. A palpable inaccuracy in the Swedish pass was held to vitiate it, which opened a wide door. A still stronger step was taken in *The Fortune*,[4] where the captain was examined, to contradict the pass. This was a great departure from the Treaties,[5] and perhaps shows how futile treaties are. In *The Sun*,[6] however, the pass was accepted in lieu of all other documents.

7. Contraband.

Apart from the special situation created by the much controverted Swedish treaties, little authority is to be found on contraband in these cases. Naval stores were asserted to be such in *Gilbertson* v. *Binney*.[7] It was a strong case, for the cargo was clapboard 'prepared for making of steps to wine puncheons and for cooper work, not being but about three foot of length.' This material was held contraband. There can be no doubt that the decision was wrong, and Stair comments that 'a great part of the most able part of the Lords were of the contrary opinion.' We cite the case as an early instance of the assertion of the contraband character of naval stores; and we may add to it *The St. Peter* (1673) 2 Stair, 182, where joists and balks were condemned, no port of destination being named for them.

At that early date the contraband character of provisions was still hotly controverted, but the controversies turned mainly, if not wholly, on the terms of the Swedish treaties and of the Treaty of Breda. In *The Sun*[8] it was urged that grain was not contraband unless carried to a city besieged, and that this was recognised, if not by the Swedish treaties at least by the Treaty of Breda. In *The Bounder*[9] it was laid down by the Court that victual or other goods *ancipitis usus* were not contraband when carried to Amsterdam, and that this was in accord with the Treaty of Breda. It is inferred that the treaty is only in this respect declaratory of the law of nations; it is 'conformed to the maritime law, making them only contraband when they are carried to a besieged place.' (It will be remembered that the Foreign Office, in 1910, poured scorn on the Glasgow Chamber of Commerce, which cited this ancient rule. In the

[3] (1671) 1 Stair, 745.
[4] (1673) 2 *ibid.* 672.
[5] See Article 15 of the Treaty of 1661.
[6] *Supra*, p. 31.
[7] (1669) Gosford MS. No. 80, p. 28; No. 157, p. 59; S. C. *sub nom. The King of Poland*, 1 Stair, 626.
[8] *Supra.*
[9] *Supra.*

opinion of the Office, the chamber was confusing the law of contraband with the law of blockade! But, of course, it might often be preferable to rely on contraband rather than on blockade.[1])

In *Parkman* v. *Captain Allen*,[2] as we have seen, the same point was taken; and it succeeded also in *The Leopard*.[3]

8. Trade by Neutral between Enemies.

It is curious that there appears to be practically no authority on this subject. If a neutral is domiciled in a belligerent country, of course he cannot trade with its enemy. If he is carrying on a house of trade there, perhaps he cannot export its products to the enemy; and possibly either belligerent may confiscate on the high seas his goods embarked in such a trade, although he may personally be a domiciled neutral subject. But if he has no 'house of trade' in either belligerent country, can he carry goods from one to the other? This may be forbidden by municipal law, of course, and a clearance for such a voyage refused. But is either belligerent entitled to seize his ship and goods on the high seas as prize? It would seem not. 'Trading with the enemy' is forbidden, because of the danger of allowing friendly intercourse between one's own subjects and enemies. But it is impossible to restrict the intercourse of neutrals with one's enemies, and if they desire to proceed from our ports to theirs there is no international warrant for interfering with the transit.

The Stettin[4] sailed from (enemy) Rotterdam for Leith, and was captured and duly libelled by H.M.S. *Coburg*. The ship was released as neutral Prussian property, and the cargo was claimed in part by a neutral Hamburg firm, Cordes & Grossmeyer. These neutrals stated that they had bought (by letter) in Rotterdam linseed, madder, gin, flax, clover-seed, and other articles from or through Van Egmont & Sons, merchants there. The bills of lading and invoices were made out as on a voyage for Bergen to deceive Dutch and French cruisers. It was alleged that Cordes & Grossmeyer were merely a blind for Van Egmont. But as the bills of lading were actually sent to them at Hamburg, the Court of Session considered the traffic a legitimate form of commerce.

[1] In the Continental theory goods cannot be condemned for breach of blockade without an express warning on the spot, whereas contraband needs no such prior individual warning. See the writer's Britain and Sea Law, p. 53*n*.

[2] *Supra*, p. 40.

[3] (1673) 2 Stair, 213.

[4] *O'Neal* v. *Cordes & Grossmeyer* (1805) Fac. Col. No. 221, p. 498; No. 2, p. 7.

The point is neatly put, and the law correctly stated, by counsel: 'The principles of law relative to a trade between two belligerent countries declare that a direct trade for the benefit of the subjects of either, is illegal; but if the goods be truly the property of a neutral merchant, although they may have been shipped for his behoof in one of the belligerent States, with the intention of being carried directly into the other belligerent country, but still for his behoof, they are not legal prizes, but, if seized, must be restored to the neutral merchant.'

9. Insurance.

It was urged in *The Golden Falcon*, *supra*, where the ship was insured in Amsterdam, that the risk lay on the King's enemies and warranted confiscation. Unfortunately, the point did not need to be determined, as the ship was also owned, as to three thirty-seconds, in Amsterdam; and it was held that the neutral owners ought to have cut themselves free from this connexion: cf. *The Cap Corso*.

10. Nationality of Leased Territory.

In *Henrison* v. *Ludquharn* (1666) 1 Stair, 418, 425, a very interesting point arose. Scotland was at war with Denmark, and Denmark had pledged Heligoland to the Duke of Holstein, who had the actual possession of it. Holstein and the Empire were at peace with Scotland, and Henrison was a Heligolander. A Scots privateer took his ship and carried it into Peterhead, but the Court of Session released it. They placed their decision on the fact of the actual control of the island being in the hands of the Duke, and on his not being a mere vassal, but a Sovereign having the right to make peace and war. On this last point they laid great stress: 'If the inferior Prince do enjoy the privileges of making war and peace, he is not a simple subject. . . . So the Duke of Holstein, being a sovereign Prince, and possessing this island, so as to make use of the subjects thereof in peace and war, is not comprehended in the King of Denmark's quarrel.' It would, therefore, seem as though the inhabitants of leased territories may properly be regarded as *pro tempore* the subjects of the tenant Power; lease is as compelling as pledge, though perhaps a Romanist would argue that *pignus* carries possession while *locatio-conductio* does not. It would also seem to follow that Australia and Canada cannot enjoy any international status, as they do not even claim to be able to make war and peace.

11. The Three-Mile Limit.

Restiveness has been shown by some nations against the perfectly well-established limit of three nautical miles for territorial waters. So well-established was it in 1874 that it was argued in *R.* v. *Keyn* that it was part of the law of England. It is surely the worst possible service to international harmony to endeavour to cast doubt on generally-accepted rules of this kind, the only alternative to which is conflict and anarchy. In *Benton* v. *Brink: The Joanna Catharina*,[5] we find it stated of the neutral proceedings in Denmark that 'proof being led, that she was taken *a German mile from the shore* . . . the captor was allowed to dispose of her, agreeably to the edicts of the King of Denmark.' No question was made that such was the extreme limit of the neutral water.

12. Enemy Claimants in Prize.

Although it is sometimes said that an alien enemy has no *locus standi* in prize, any more than in civil proceedings, such a *dictum* is clearly wrong. It is opposed to the authoritative pronouncement of the Lee-Murray Memorandum, the great fountain of all our information as to prize law, and to the English case of *The Fenix*.[6]

In *The Noord Holland*[7] the question was whether a Dutch ship arriving in ignorance of hostilities at Leith was entitled to the terms of an exemption from capture accorded to ships in British ports. It was held that she was, and no objection to the suit was raised on account of the hostile quality of the claimants, William T'Hart, master, and Class Iaanen Zoonen, owner.

Therefore, when counsel say in *Wake* v. *Bauerman*, *infra*, that there is no instance of an enemy appearing, that his appearance would *ipso facto* condemn, and that there is no instance of restitution to an enemy, this can only be considered a mistake—and rather a careless one.

13. Capture by Merchantman.

As lately as 1797 the *Diana* effected a recapture of the *Lady Bruce*. This was regarded as perfectly proper and regular; and although it might not confer a title in competition

[5] (1761) Fol. Dic. v. 4, p. 143; Fac. Coll., No. 49, p. 104.

[6] (1854) Spinks, 3. Cf. *U. S.* v. *1756 Shares* (1865) 5 Blatchford, 231; and Wheaton, Captures, p. 39, where it is stated that French ships illegally captured while neutral were restored by the English Courts after France had become an enemy. Sed cf. *The Falcon* (1805) 6 C. R. 194, at p. 199, and distinguish.

[7] (1781) Fac. Col. No. 3, p. 7.

with the Crown, it created an insurable interest.[8] Counsel observe that: 'The right of making captures extends to all vessels "under His Majesty's protection and obedience."' Very certainly acts of war by private ships with no commission were not regarded as acts of piracy.[9] The English Privy Council resolved in 1665 (Marriott, p. 51; 1 C. R. 231): 'That all enemy's ships and goods casually met at sea, and seized by any vessel not commissioned, belong to the Lord High Admiral.' Why Continental nations should be allowed to alter the law, and to declare merchantmen which attack piratical, it is difficult to conjecture. In *The Helen*, 3 C. R. 226, it is stated by Sir W. Scott to be 'the duty of every subject of the King to assist his fellow-subjects in war, and to retake their property in the possession of the enemy.'

In another case an uncommissioned captor, the Laird of Balwhilly, seized a ship and loading, whereupon Colonel Seaton, the governor of the fort at Brassie Sound, intromitted with the subjects, and successfully defended himself before the Prize Court, on the ground that private captors have no rights, and that their captures vest in the State. This seems to dispose of the modern Prussian heresy that private vessels cannot validly make captures. The capture was recognized as valid enough.[10]

14. Miscellaneous.

Joint Capture.

Coningsby v. *Mastertoun* (1668) 1 Stair, 520, recognizes as well-established the principle that a vessel in a position to assist in the capture is a joint captor, though she may not actively participate in the work. But in *The Tortoise* (1677) 2 Fol. Dec. 177; 2 Stair, 507; Gosford MS. No. 966, p. 640, it was held that pursuing vessels had only a mere expectation, which it was open to an ally to defeat.

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[8] *Yelton* v. *Smith* (1801) Fac. Col. No. 3, p. 7.

[9] See also *The Cape of Good Hope Cases*, 2 C. R. 280 *et seq.*; also an *Anonymous Case* referred to by Laurence, LL.D., in *The Melomane*, 5 C. R. at p. 42: 'a lieutenant on board a non-commissioned ship at the time a capture was made . . . was entitled to no benefit from his commission'; and several cases in Rothery, Prize Droits (ed. Roscoe), *e.g. Conde de Galbez* (1796) p. 43; *Lady Jane* (1786), p. 37; *Haase*, p. 108; *Franc* (1793), p. 34; *Diligence* (1800) *ibid.* p. 43; *Graf Bernstorff* (1795) p. 43; *Sartine* (1778) p. 107; *Oprecht* (1811) p. 107; *Vengeur* (1797) p. 108. Cf. *The Urania*, 5 C. R. 148, where a recapture was made by a non-commissioned ship, and she was given salvage, Scott remarking that there must be many cases of the kind, and observing: 'According to all the ideas which I have been taught to entertain on the subject, the non-commissioned vessel is fully competent to assert an interest in salvage.'

[10] 1 Stair, 481, 483, 484, 534.

Sale of Perishable Cargo.

Merchants of Hamburg v. *Dishington* (1668) 1 Stair, 532, shows that perishable cargo ought to be sold by public auction, and not disposed of privately.

Licences.

A curious instance of a general licence to trade with the enemy is found in *The Raphael*,[1] where licence had been granted by proclamation to import timber from enemy countries after the burning of London.

'Enemy Goods, Enemy Ships.'

It is singular to find this harsh rule, 'La robe ennemie confisque le vaisseau ami,' put in force by Scotland and England in 1673. In *The St. Andrew* (*No.* 1)[2] the legality of such a rule was considered and not decided; the Lübeck ship, with enemy Dutch goods on board, was released, because the lading was made before the outbreak of hostilities. Four months later the rule was definitely announced.[3]

Sale of Enemy Ship to Neutral.

As in the later English practice, it was held that a ship could validly pass from enemy (Dutch) to neutral (East Friesland) character while on the high seas, and without 'touching ground' (a somewhat sinister expression, but it only means 'calling').[4] In *The Margaret*,[5] however, it was held that a sale in enemy (Dutch) territory failed of validity for technical reasons; the requisite sworn testimony verifying the fact ought to be made in Amsterdam, and owing to the war could not be.

This reasoning was swiftly repudiated in *Hamilton* v. *A Stettin Ship*,[6] where the claimant's oath as to his purchase was held sufficient. It is stated in argument that, on such an alleged invalid sale to a neutral in enemy waters, the ship may by the practice of nations be captured 'before breaking ground' in neutral dominions, and presumably not subsequently. This is a distinction which has quite passed out of use.

Doctrine of Infection.

This seems to have been freely applied in the war of 1624: see *Parkman* v. *Captain Allen*, *supra*. But it was definitely negatived

[1] Gosford MS. No. 169, p. 67; S. C. *sub nom. Wood* v. *Boyneilson* (1669) 1 Stair, 636.
[2] 2 Stair, 171.
[3] *The Venus* (1673) *ibid.* 196, 212; *The Young Tobias*, *ibid.* 208.
[4] *The Prince of East Friesland* v. *Captain Binning* (1673) 2 Stair, 177, 179.
[5] *Ibid.* 179.
[6] (1673) 2 Stair, 221.

in *The Mary*.[7] The goods of enemies on board a ship do not make the goods of friends in the same ship confiscable. A somewhat different question receives a different answer in *The St. Katharine* v. *The St. Mary, supra*. It is impossible to release part of the interests in a vessel; if any share is enemy property, the whole is confiscable. (This principle does not necessarily apply to pledges, mortgages, and charterparties; it is laid down simply as a matter of ownership in common.) This rather sweeping, but probably still valid, rule was again applied in *The Golden Falcon*.[8]

Enemy Ship, Enemy Goods.

This rule also seems to have been in force, and was even applied where only a share of the vessel was enemy property: 'the ground whereof in justice is, that the other parties concerned do concur with the King's enemies in carrying on of their trade.' But that was not to prejudice the King's subjects who ordered goods from abroad and could hardly be expected to know what was the nationality of all the ship-owners.[9] It is difficult to see why neutrals were not to have the benefit of these considerations. But the whole subject is obsolete; traces of the rule only survive in the presumption that goods laden on an enemy ship are enemy goods.

Allies' Trade with Enemy.

This is recognized to be improper, and a cause of capture, in *The Katharine*.[1]

Property on Recapture.

The rules are laid down in *Stuart* v. *Captain Collier*[2] that recapture before the prize is taken *infra praesidia*, even after twenty-four hours' possession, revests the property in the original owners, and that recapture of a brocage or ransom-bond discharges the capture. There is a highly interesting discussion reported on the various points involved, and on the question of to what extent the giver of a ransom-bill is entitled to claim in general average. In *Wake* v. *Hilary Bauerman & Son*[3] the more modern doctrine is pronounced—that not only

[7] See *The Bounder, apud* Gosford (*ubi supra*), fifth resolution.
[8] (1673) 2 Stair, 215; cf. p. 43, *supra*.
[9] *Clark* v. *Smeitoun* (1673) 2 Stair, 240.
[1] (1705) Dalrymple, No. 62, p. 78; 2 Fountainhall, 271 (the better report).
[2] (1714) 2 Fol. Dec. 177; Forbes, 633; Forbes MS. 27.
[3] (1801) Fac. Col. No. 246, p. 556; *The Mary aliter The Stettin*. This case also establishes that the condemnation may be in the territory of an ally.

the fact of bringing the prize *infra praesidia*, but also a prize decree, is requisite in order to pass the property.

Prizes and Neutral Harbours.

The *John and Robert*, of Newcastle, was seized in 1757 off the coast of Norway by a French privateer, carried into Christiansand, and condemned by the High Admiral of France, sitting in that kingdom. She was arrested and claimed (whether previously or subsequently does not appear, nor is it material) by the English master in a Danish Court at Christiansand, but eventually a decree of the Danish tribunals declared her to be the property of the captors. The ship was then sold by auction, purchased by a Dane, and sent on a voyage to Aberdeen. Here the English owners made another attempt; they applied to the magistrates as admirals-depute, and again had the ship arrested. The cause was referred to the High Court of Admiralty, and on appeal it reached the Court of Session. It will be observed that the ship had never been brought *infra praesidia* of the captors. Counsel insist strongly that Grotius never meant to lay down the 'twenty-four hours' rule' as superseding the *infra praesidia* rule. He intended, they say, merely to supplement it. The captured property should remain for twenty-four hours *infra praesidia*; a snatched and momentary safety was not enough. Counsel on the other side contend that, 'what is more important than a thousand opinions of lawyers or doctors,' they can produce a certificate of the English Procurator-General certifying the condemnation in London of various prizes carried by British privateers into neutral ports in the Mediterranean.[5] Two awkward cases to the contrary in Molloy[6] they dismiss as being captures by virtue of letters of marque, in which case they admit the rule was different, since the commission directed the prize to be brought *infra praesidia*.

Whether the Court was most impressed by the French condemnation or the Danish decree (which, as the judgment of the tribunals of the *locus*, would be entitled to great and probably decisive weight)[7] does not appear. Anyhow they declined to restore the vessel, holding that the property was

[5] Two such cases were considered by Sir W. Scott in *The Flad Oyen* (1799), p. 141; but he minimized their effect, not in the most convincing way. In that case it is still noted as an open question whether prizes may be validly condemned in an enemy Court while lying in the port of a neutral. In *The Mary aliter The Stettin*, supra, the condemnation was pronounced, and the ship lay, in the territory of an ally.

[6] De jure maritimo et navali, I, i, § 14; I, ch. 4, § 15.

[7] Cf. *Castrique* v. *Imrie* (1870) L. R. 4 H. L. 414; *Cammell* v. *Sewell* (1860) 5 H. & N. 728.

regularly transferred. This was in 1761.[8] In 1764[9] a somewhat similar state of facts occurred, only the prize was (before condemnation) improperly cut out from the neutral Danish port, by the boats of H.M.S. *Lynx*. The owners claimed her (or rather the proceeds of her sale), but the Court of Session directed the money to be paid over to the King of Denmark (who presumably would transmit it to France). It is curious to notice that an appeal lay from this decree to the House of Lords, which affirmed it.

Contrabandists on the Return Voyage.

It is said by counsel in *The King David*[1] that the Lords of Session treated the proceeds of contraband as confiscable 'in the last war' (*i.e.* that of 1624). This appears to be a mistake; the true ground of confiscation is stated in *Parkman* v. *Captain Allen* (*supra*), to have been the infection of enemy goods. In that case we find the principle that the ship is free on the return voyage still controverted, though unsuccessfully. It was argued, on the one hand, that the contraband trade is beyond all doubt at that advanced stage of the venture, and, on the other hand, that a roving commission to seize ships where the cause of offence was not 'sensible to the eye' would be destructive of all neutral freedom. The technical point was further taken—that the King's commission was to seize contraband, and not its proceeds. The claimants also produced a certificate from Sir Leoline Jenkins, the English Admiralty judge, who declared, after consultation with the Advocate-General and search of the records, that he knew of no such practice. In July, 1673,[1] the question was settled in the negative, on the ground that the Swedish treaty of 1661 says nothing to warrant the confiscation of the proceeds. A month or so earlier, in *The Bounder*,[2] the question seems still to have been treated as an open one.[3]

Claim by Subject.

Absence of documents was, in one curious case, not allowed to prejudice a claim by a subject, Sir Francis Clark, who had a small quantity of wine on *The Calmar*.[4]

[8] *Benton v. Brink* (1761) 4 Fol. Dec. 143: Fac. Col. No. 49, p. 104. Cf. *Anon.* (1763) *apud* Fountainhall, Adv. MS. No. 418, fo. 224.

[9] *Hunter* v. *De Bothmer* (*Count*) *and Captain Stewart*, Fac. Col. No. 130, p. 312; *The Maria*, 4 Fol. Dec. 145.

[1] (1673) 2 Stair, 180, 220; *The Leopard* (1673) *ibid.* 213. [2] *Supra.*

[3] The statement in the Yale Law Journal article (p. 465), above cited, that it was declared that the proceeds *could* be adjudged prize, is incorrect; some typographical error has evidently crept in.

[4] *Clark* v. *Smeitoun* (1673) 2 Stair, 220.

Sale of Cargo.

In regard to this item of wine restored to the claimant, it was declared that, if the sale were after adjudication, only the proceeds need be restored; whereas, if it were effected before that, the captors must restore the price of the wine at Stockholm: 'Such wine not having a known price here.'[4] Where cargo was improperly sold in another case,[5] the captor had to restore its full value, although he had paid the King his fifteenth and the Admiral his tenth; though, in still another,[6] the Crown disgorged the fifteenth and the Admiral (with more reluctance) the tenth.

Evidence.

When the indulgence of 'further proof' was allowed to claimants, against a discrepancy of testimony on the primary evidence, the Court declined to issue a commission to Friesland, where the claimants lived, as being too near belligerent Holland.[7] A commission was, however, granted without difficulty to the Lord Mayor of London to examine on a question of further proof.[8]

Validity of Orders in Council.

In *The Sun, supra,* it was said that the King had declared the carrying of corn to Holland to be contraband trade. It was answered that the Court ought not to proceed by the King's private instructions, but by his public treaties confirmed by oath: see also *The St. Andrew (No. 2).*[9]

Conclusion.

The cases noted above under the general heading of 'Miscellaneous' are principally of historical interest only. But the preceding ones seem to be of great use as establishing the true principles of prize law, which, as a balance of belligerent and neutral interests, cannot essentially change with time, and which, in the words of Lord Mansfield and his colleagues, are such as to render any other mode of trial 'unjust, absurd and impracticable.'

No matter what rules may have been laid down in recent

[4] *Clark* v. *Smeitoun* (1673) 2 Stair, 220.
[5] *Mertumer* v. *Strangers of Ostend* (1668) 1 Stair, 532.
[6] *Bramfield* v. *Duke of Lennox* (1675) 2 Stair, 313.
[7] *The Prince of East Friesland, supra.*
[8] *Clark* v. *Smeitoun, supra.*
[9] *Supra.* Cf. *The Reine des Anges*, Croke's Nova Scotia Reports, p. 10, and the well-known cases of *The Maria*, 1 C. R. 340, and *The Walsingham Packet*, 2 C. R. 82.

cases, these fundamental principles of fair trial can never be permanently affected.

'I am not ignorant,' said Lord Stowell on a memorable occasion,[1] 'that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, has thrown upon the world, it has been within these few years advanced, or rather insinuated, that [changes are necessary]. Upon such unauthorized speculations it is not necessary for me to descant. The law and practice of nations . . . give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, which nations may perhaps remember to forget them, when they happen to be themselves belligerent, no reverence is due to them. . . . If it were fit that such a [changed] state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized States, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of States, and of the lives and safeties of innocent individuals.'

The grave innovations introduced into the practice of Prize Courts in recent years are obnoxious to every word of this weighty deliverance. The foregoing pages show how grave and how revolutionary these innovations are. Great authorities are inclined to accept them with a light heart, as justified by changed conditions, without for a moment pausing to examine why or how. Such an attitude must be considered profoundly unsatisfactory. For instance, no technical study has ever been made of the extent to which the neutral railway is countered by the belligerent fast cruiser.

It may be said that this is all antiquarianism, and that the subscriber is harping on an obsolete practice and endeavouring to force a totally careless world into the mould of the eighteenth century. This is far from the intention of this article. It is, on the contrary, designed to show that neutrals, on the whole, have rights, and that during prolonged periods and great wars these rights prevailed and confined belligerents to a cheap,

[1] *The Maria* (1799) 1 C. R. 362 *et seq.*

quick, and objective procedure in prize. The excesses of belligerents, justified as reprisals in a great war, are no guide to the future. The experience of three centuries does constitute a guide. Either we shall sink into the quicksands of anarchic violence, or neutrals will once more assert their freedom, as they asserted it in 1661, in 1713, in 1778, and in 1856. The exact form in which they will tie the belligerent down to clear objective proofs is immaterial. The substance is what matters, and it is imperative that the substance of Lord Mansfield's classic Report shall be restated for our modern necessities, and belligerents allowed to touch neutral commerce only when they can condemn it 'out of its own mouth.'

As in the past the victories of neutrals were largely due to the power of commercial Holland, so in the future we may hope that the restatement will be made by the power of commercial Britain.

T. Baty.

RE-ENTRY FOR FORFEITURE:

THE CASE OF *ELLIOTT* v. *BOYNTON*.

IN the case of *Elliott* v. *Boynton* [1924] 1 Ch. 236; 93 L. J. Ch. 122, the Court of Appeal decided that where a landlord brings an action for the recovery of possession of land against a tenant upon the ground of forfeiture the landlord is entitled to mesne profits only from the date of the writ in the action. The Court held that upon a forfeiture the lease continues up to the time that the landlord exercises his power of re-entry: and they held accordingly that, in the case before them, for the period from the date of the breach of covenant giving rise to the forfeiture until the issue of the writ for possession, the landlord was only entitled to the rent and not to mesne profits.

It is here submitted that upon re-entry for breach of covenant, the lease is determined as from the date of the breach, and that the decision in *Elliott* v. *Boynton*, *supra*, is contrary to the principles underlying the doctrine of waiver of forfeiture, and contrary to a considerable body of authority, none of which was cited to the Court of Appeal.

The argument presented to the Court of Appeal on behalf of the landlord was that upon re-entry for a forfeiture the title of the landlord related back to the date of the breach: but the Court held that the doctrine of relation back could not be invoked so as to render unlawful an act which was lawful at the time it was done: that is, it could not be invoked so as to make the lessee a trespasser. It is submitted that this way of putting the matter in effect begs the question: for the very question before the Court was whether or not the lessee's occupation had been lawful since the date of the breach.

The whole doctrine of waiver of forfeiture proceeds upon the assumption that it is in the lessor's election to determine the lease as from the date of the breach giving rise to the right of re-entry: for whether an act is such as to constitute a waiver of forfeiture depends upon whether it is an act which recognizes the lease as having continued in existence since the date of the breach. It is so laid down in Smith's Leading Cases (Vol. I, p. 41): 'Any unequivocal act done by a lessor, after forfeiture

incurred, by which he acknowledges that the tenancy existed after the forfeiture was incurred, will operate as a waiver of the forfeiture.' This test implies an option in the lessor to treat the lease as determined by and from the breach.

If the case of *Elliott* v. *Boynton* is correctly decided, it falsifies this test, for, according to that decision, the lease continues in existence of its own force until the lessor makes his election; and therefore, at the moment of election, there could be no option in the lessor to treat the lease as having continued in existence since the breach, for that would irrevocably be the case in any event. His only option at the moment of election would be between determining the lease forthwith and allowing it to continue thenceforward; and in such circumstances the test of waiver would be whether the act was such as to show an intention to allow the lease to continue thenceforward, that is, in the future. But it is submitted that such a test is contrary to all the decisions on what constitutes a waiver of forfeiture.

The position is well illustrated by the cases on the acceptance of rent: if the rent accepted is rent which accrued due before the date of the breach, its acceptance will not waive the forfeiture; but if it is rent which accrued due after the date of the breach, its acceptance will waive the forfeiture. The reason being that, in the latter case, the lessor treats the lease as having continued since the breach; he affirms it to have existed from the date of the breach until the date the rent fell due. It is to be observed that the acceptance of such rent does not show any intent to continue the lease from the date of acceptance onwards. The principle underlying the cases is laid down in *Marsh* v. *Curteys*, Cro. Eliz. 528, in terms very apt to the present discussion. It was a case where the lessor had accepted rent which accrued due after the breach of a condition 'not to parcel out the land,' and

'Anderson and Beaumond held, that this acceptance shall bar him of his entry: *for he accepted it as rent due unto him by the lease; which cannot be, if the estate be undone by an act precedent: for if he had entered for the condition broken he could not have had the rent;* and when he accepted the rent, he shews his intent and election to have the lease continue: and there is not any difference, as to this purpose, betwixt a collateral condition and a condition for paying rent; for the reason that he should be barred of his entry is one in both cases, viz. *because, by his own act, he hath affirmed the lease to have continuance after his title of entry accrued unto him:* but the acceptance of rent due before his title of entry is no bar; for it being then due

he might have debt for it; and it doth not shew any election in him to continue the lease as it doth here.'

A later and equally clear enunciation of the same principle was made by Blackburn J. in *Ward* v. *Day*, 4 B. & S. at p. 358.

'The acceptance of rent, accrued due after the cause of forfeiture is an avowal and assertion that the estate continued after, and shows that the landlord has determined his election, and he cannot afterwards treat the lease as void and enter after that period. But the receipt of rent accrued due before the forfeiture is no waiver; *there is nothing to show that the estate continued.*' And Crompton J. said in the same case (at p. 352):

'Waiver by receipt of rent only applies to rent accruing subsequent to the forfeiture, and that is not the present case. There is no inconsistency in a man who has given notice to determine a tenancy receiving rent due before the *supposed determination* of it, and consequently there is no waiver by receiving that rent, as was expressly determined in *Green's Case* (Cro. Eliz. 3).'

It is submitted therefore that the foundation of the doctrine of waiver of forfeiture is that the lessor has an election either to treat the lease as determined by the breach, or to treat it as having continued since the breach. If he elects to re-enter, he exercises the first arm of the election, and the lease is determined by and from the breach. As was said by Willes J. in *Grimwood* v. *Moss*, L. R. 7 C. P. 364, 'Such right of re-entry, as in the cases to which the doctrine of remitter applies, is referred back to the earliest period at which a good title could be made, viz. to the first breach in respect of which the right to re-enter arose, and which has not been waived.'

This view of the law is supported by numerous cases in which it has been laid down or assumed that upon re-entry for a forfeiture, the lessor is not entitled to rent after the date of the breach, but only to mesne profits:—

(i) Lord Coke in his report of *Walker's Case*, 3 Co. Rep. 23b, says, 'And it was agreed, that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the *arrearages due before the condition broken*, or the surrender made, and that in respect of the contract between the lessor and the lessee.'

So accurate a lawyer as Lord Coke would have said that the lessor had an action for the arrearages due before re-entry if such had been the law. See also to the same effect, *Pennant's Case*, 3 Co. Rep. 64b.

(ii) Martin B. in his opinion in *Croft* v. *Lumley*, 6 H. L. C. at p. 721, deals specifically with the point. In discussing the effect of a breach of condition he says, 'Upon the breach of condition the landlord would acquire a right of re-entry. If he brought an ejectment, *his title would accrue at and from the time of the breach, and he would be entitled to maintain, not an action for use and occupation, but one for mesne profits for the time intervening between the accruing of his title and his obtaining possession.* So also, if he entered without an ejectment, I apprehend his claim in respect of the wrongful occupation of his land from the time of the breach until the actual entry, would be in the nature of a demand for mesne profit, and not for use or occupation, which, generally speaking, is founded on a contract express or implied.'

(iii) In the case of *Dendy* v. *Nicholl* (27 L. J. C. P. 220; 4 C. B. (N.S.) 376) the lessor had previously brought an action for rent accrued due after the forfeiture, but before judgment he commenced this action in ejectment for the forfeiture, and it was held that the forfeiture was waived by the previous action for rent.

Willes J. said (27 L. J. C. P. at p. 222):

'If the landlord recovers in this ejectment, *as he may have judgment for the mesne profits from the determination of the tenant's interest till verdict*, he will in effect recover the rent twice over.'

Crowder J. said (4 C. B. (N.S.) at p. 386):

'If this action were held to be maintainable, this gross inconsistency would result, viz. that the plaintiff, having already recovered the rent up to Lady Day, 1857, would recover the land by reason of the forfeiture in 1854, and also, as my Brother Willes suggested in the course of argument, mesne profits down to the time of the verdict. Such a result could never be permitted.'

Byles J. said (4 C. B. (N.S.) at p. 387):

'The plaintiff relies upon the lease for the purpose of enforcing payment of the rent; *and now he says that during the same period it was mere waste paper.* That clearly can never be permitted.'

(iv) In *Cotesworth* v. *Spokes*, 10 C. B. (N.S.) 103, the plaintiff sought to recover in ejectment for forfeiture for non-payment of the Midsummer rent, but the Court held that a distress for the Michaelmas rent waived the forfeiture. The Court (Erle C.J., Williams, Willes and Keating JJ.) said (at p. 112):

'If it were otherwise, the plaintiffs would by this action establish their right to the possession of the demised premises, *and to deal with the defendant as a trespasser at a date anterior to Michaelmas*, although the plaintiffs, by their distress, have treated the defendant as being rightfully in possession as tenant up to that date.'

(v) In *Toleman* v. *Portbury* (L. R. 6 Q. B. 245; 7 *id.* 344) the lessor in 1870 brought an ejectment for forfeiture relying on alternative breaches, firstly, a breach in 1867 of a covenant not to permit an auction sale, secondly, breaches after 1867 by non-payment of rent. The tenant eliminated the second ground of forfeiture by paying the rent into Court under the Common Law Procedure Act: but the Court of Queen's Bench, affirmed by the Exchequer Chamber, held that the lessor could still rely on the first ground of forfeiture.

Cockburn J. said (L. R. 6 Q. B. at p. 249):

'If he (the lessor) establishes the first ground (*i.e.* the breach of covenant in 1867) then he cannot go any further, *because he has already shown that the tenancy no longer subsisted*, and he could not have a verdict on both breaches; and the defendant consequently will be entitled to get back the money which he paid into Court on the supposition that there had been a breach of covenant in not paying the rent.'

And in the Exchequer Chamber Kelly C.B. delivering the judgment of a Court of nine Judges said (L. R. 7 Q. B. at p. 352):

'It is said it is an injustice that the plaintiff should be able to maintain the forfeiture and still have the rent: but I cannot see this; the plaintiff is clearly entitled to the money, *either as rent if there were no forfeiture, or as mesne profits if there was.*'

It is submitted that these cases show the opinion of the Courts always to have been that on re-entry for a forfeiture, the lease is to be taken as determined from the date of the breach giving rise to the forfeiture.

Again, if the decision in *Elliott* v. *Boynton* is correct, it follows that a lessor seeking to regain possession for a forfeiture can, with perfect consistency, join in the writ with his claim for possession a claim for rent accrued due up to the date of the writ; but it is submitted that upon the earlier authorities a writ combining two such claims would be bad for inconsistency, and indeed the claim for rent would probably operate as a waiver of the forfeiture. The claim for rent treats the lease as existing up to the date such rent accrued due, whereas the claim for

possession treats the lease as having determined at the date of the breach. In *Bevan* v. *Barnett*, 13 T. L. R. 310, Wright J. non-suited a plaintiff on this very ground, and in *Penton* v. *Barnett* [1898] 1 Q. B. 276, the Court of Appeal inferentially held that a claim for rent contained in a writ claiming possession operates as a waiver of a forfeiture incurred before the rent accrued due. In that case the writ was dated January 14, 1897, and claimed (i) possession for forfeiture for breach of covenant to repair; (ii) rent to December 25, 1896. The Court held that although such a claim for rent would operate as a waiver of any forfeiture up to December 25, nevertheless inasmuch as the breach was a continuing breach, the writ was available for a claim for forfeiture in respect of breaches between December 25 and January 14. A. L. Smith L.J. said (at p. 279):

'An objection was taken that by claiming in the action rent up to December 25 the plaintiff had affirmed the tenancy at that date. It is perfectly well settled that the acceptance of rent is an acknowledgment of the existence of the tenancy, and if the case depended solely on that, I should have thought that the action was not maintainable; but it is pointed out that the claim for rent is at most an election to treat the defendant as tenant up to December 25, and that, inasmuch as between that date and January 14 following the premises were in the same state of disrepair in which they had previously been, there was a breach of covenant between those dates in respect of which the plaintiff could maintain his action for possession. In my opinion . . . this contention is well founded.'

And Collins L.J. 'entirely agreed.'

It is submitted that if the authorities referred to above had been cited to the Court of Appeal in *Elliott* v. *Boynton*, the decision in that case would have been different. It is submitted that the question whether or not a lessee's occupation has been lawful since the date of the breach, is a question which remains open until the lessor makes his election: the lessee who is in breach should not be allowed to assert that his possession has been lawful; and if the lessor elects to re-enter, the lessee's possession ought to be deemed unlawful as from the date of the breach.

It was suggested in *Hartshorne* v. *Watson*, 4 Bing. N. C. 178, 183, that this view works hardship on a lessor who seeks to recover, say, damages for breach of covenant to repair in the intervening period between forfeiture and writ; but it is conceived that the answer is that any damage so suffered, although

not recoverable by way of damages for breach of covenant, is properly recoverable as mesne profits: for mesne profits are but damages for trespass, and the amount must be such as to put the plaintiff in the same position as if he had from the time of the accruing of his title let to a tenant who had performed all his covenants to repair. It is to be observed that the pleadings in *Hartshorne* v. *Watson*, *supra*, show clearly that the observations in that case were *obiter* only.

A. T. Denning.

SOME NOTES ON THE YEAR BOOKS AND PLEA ROLLS.[1]

1. Of the Reports and the Plea Rolls.

A MODERN student of the medieval Year Books is often constrained to wish that some thirteenth or fourteenth century practitioner had been at the pains to put together an elementary treatise on the general conduct of an action in the Common Bench, from the calling into Court of the parties to the delivery of judgment. But as in those early days everyone who was interested in such matters knew all about them, it seemed worth nobody's while to write down what was then common knowledge, and it was nobody's concern to think of the puzzled student of later ages confusedly groping his way through the tangle of mediaeval procedure, asking himself all sorts of questions and finding no certain solutions of many; thinking now and again that to some of his questions he has found the answer, only to recognize later that the bottom has been knocked out of his theory by happenings in Court hitherto unknown to him. As a specimen puzzle consider the case where a lady brought a writ against the Abbot of Fountains. She was seeking to recover her right to a common of pasture. The Abbot, so we gather, denied her allegations generally and then went out of Court to imparl. When he returned, he advanced to the bar accompanied by his champion. Obviously it was his intention, as we must suppose it was his right, to have the case decided by battle. Serjeant Toudeby, who was appearing for the lady, recognizing this, advised his client to withdraw from any further prosecution of her claim, on the ground that if she had awaited a formal joinder of battle she would have lost her right of action for ever; and the Court thereupon non-suited her. What does all this mean and what mystery of procedure lies latent in it all? I confess that I do not know, nor have I been able to find anyone who can tell me, anyone to whom Toudeby's advice is intelligible. I leave the matter for the consideration of the learned. Much doubt and darkness might have been spared us if someone six or seven hundred years ago had been thoughtful enough to spare

[1] This article is a portion of the Introduction to the forthcoming Vol. xiv (Part 2) of the Selden Society's Year Book Series and is published here with the consent of the Council.

a little time in explaining for our knowledge and understanding to-day a few of the practical details of the procedure with which he himself was entirely familiar.

Possibly a modern student of the Selden volumes may find the different accounts of what happened in Court during the trial of an action, as he finds them in the Year Books and in the Plea Rolls respectively, somewhat perplexing, a little difficult to reconcile. If we look at the Year Books, the attorneys seem to be *personae mutae*. All the talking and arguing is credited to the Serjeants. Almost the only occasions on which we have even a hint that an attorney is present is when he is called upon to avow or sanction some somewhat hazardous plea which his principal's Serjeant is proposing formally to plead without possibility of recall or modification. When, on the other hand, we turn to the Plea Rolls, it is the attorneys who say everything. If these rolls were all we had for our instruction we might reasonably come to the conclusion that the Serjeants existed only for the purpose of drafting fines of land for the sanction of the Court. They do nothing beyond making these 'cyrographs'; they say nothing at all, at any rate as far as the Plea Rolls are evidence. But the two sets of documents, we must remember when we come to compare them, were put together for two quite different purposes. Like the reports in the Year Books the Plea Rolls do indeed profess to give an account of what happened in the Common Bench at the trial of an action; but it is an account stringently edited, one from which everything which had not a material bearing on the determining judgment of the Court or on the framing of the issue finally left to a jury was omitted. It was a record of material facts made for possible future reference if proof of those material facts or of any of them should afterwards be required for any purpose. If we had no other sources of information, such as the Year Books, we could not inform ourselves at all correctly of what the trial of an action in the Common Bench was like. In the first place everybody who says anything at all in the Plea Rolls is represented as saying it in Latin, while, as a matter of fact, we know that the language actually spoken in the Courts was Anglo-Norman. Latin, with its clear and precise terminology, afforded a more certainly accurate vehicle for a scientific report than did the colloquial and looser Anglo-Norman spoken in the Courts. Again, whatever is said in the Plea Rolls is put into the mouths of the actual parties to the actions, or, and more frequently, into the mouths of their attorneys, their personal representatives with full power to bind them. The Year Books, on the other hand,

were compiled by lawyers, who, as such, were not mainly interested in the merely historical facts of what pleas were in the end actually pleaded, but who were very deeply interested in the legal arguments by which it was attempted to support this or that plea, in the arguments used against it, and in the criticisms of the Justices, and all these had been couched in Anglo-Norman. To put it shortly, the Year Books give us a report, more or less condensed maybe, of what was actually said and pleaded and ruled in Court in the very words used by the speakers, whether these were Justices or Serjeants or parties to an action. The record in the Plea Roll gives us a carefully drafted summary in Latin of the outcome of what was said and done in Court, thereby providing a permanent record of all that which it was essentially necessary should be known to the Justices if at any later time the Court desired to certify itself of what had been actually pleaded and determined during the hearing of any particular action. Hence the wide difference between the records in the Plea Rolls and the reports in the Year Books. Let us see if we can reconstruct what actually happened in the Court of Common Bench during the hearing of an action in Edward II's reign. The writ, seemingly, is not read unless the Serjeant for the defence asks *oyer* of it. A vouchee to warranty is not entitled to have *oyer* until he has actually accepted the warranty. The plaintiff's Serjeant opens his case by a formal recital in Anglo-Norman of the nature of the action and the particular facts on which the plaintiff bases his claim. This statement was known as the *conte* or count in Anglo-Norman, as *narracio* in Latin, and probably as 'tale' in English. There were collections of precedents[2] for these opening statements, and all that the Serjeant had to do was to choose the suitable one and adapt it to the facts of his own case. The Serjeants for the defence then proceeded to take all the objections their ingenuity could invent to the writ and the count. The writ, they may say, discloses no ground of action, or, if it does, it is not the right writ in the circumstances; such or such another writ is the writ which the plaintiff should have brought, and they ask for judgment of the writ. Or they may say that the facts as stated in the formal count are not the facts which are alleged in the writ, and they ask for judgment by reason of the variance between the writ and the count. Or, again, they may say that even though the facts may be as the plaintiff alleges them to be, yet he is not the proper person to bring the action. When they have exhausted all these

[2] *E.g. Nouae Narraciones*, of which many manuscripts survive. It was printed several times by the early printers.

preliminary objections, the defendant will perhaps ask for a 'view' of the tenements claimed, or will pray the Court to allow him to have the 'aid' of someone or other, which means that the person whose aid he prays has a stronger interest in the tenements claimed than he has himself—the proprietary right, perhaps, while the defendant tenant has only a term of years, or an estate in dower, or the like. If the aid is allowed, the person summoned in aid will come into Court and 'join himself' with the defendant, and the two together can bring to the defence more effective artillery than the nominal defendant alone could do. These all involve questions of law which the Serjeants of the two parties will discuss with argument and counter-argument, supplemented by such remarks as the Justices may choose to interpose. When all the preliminary objections and applications have been disposed of in one way or another, then, supposing the writ has been held to be good, the actual facts of the case will be approached. The plaintiff's material allegations may be met by a flat denial, or they may be admitted in part and denied in part. For instance, in defending a writ of replevin the defendant will probably plead in justification of what the plaintiff says was an illegal distraint that the plaintiff holds land of him by certain services of which he, the defendant, is legally seised; that these services were in arrear, and that he, therefore, took the distress, and took it, an essential allegation, within his own fee. Here several purely legal questions may be raised and argued; as, for instance, that though the services were due by the plaintiff to someone, they were not, for reasons alleged, due to the defendant, or that the defendant had never had legal seisin of them. If the objections on a point of law are persisted in, the ruling of the Court will be taken, but counsel will be very careful of going to this extreme length, for an adverse ruling on some of these subsidiary points of law might well mean an adverse judgment on the whole action. And so, in such a case as we are imagining, the plaintiff's Serjeant may give up one legal objection after another to the defendant's defence and take his last and only remaining stand on the plea of fact that the distress was not levied within the defendant's own fee, a quite effective plea if it can be substantiated. The mediaeval Serjeant very seldom began by relying on the material facts of his case. He would exhaust every possible defence based on points of law before he would take his stand on the facts, no matter how strong they appeared to be; but he was very careful not to carry his objections on points of law to the extreme point of demurring on them unless he felt pretty sure, from the Justices' remarks

during the course of the argument, that the Court was in agreement with him; or else, with facts behind him strong enough to win his case, he might lose it by an adverse ruling of the Court without ever getting an opportunity of setting up his facts. But he was a careful man, taking things in their right order, and not letting slip any chance of winning his case by a ruling of the Court on some question of law. The reference of a definite issue of fact to a jury was only adopted when it seemed that there was nothing else to be done; and who could tell whether facts which seemed strong enough before they were seriously contested might not turn out to be somewhat uncertain when a jury came to inquire into them? When the result of these preliminary skirmishes in Court between the Serjeants had tended to show that this or that was the best and safest form of answer or reply that could be formulated it was formally pleaded by the Serjeant. During these oral altercations a contemporaneous official minute was made in Latin by one of the clerks of the Court embodying all the different allegations of fact made on either side, up to and inclusive of the definite issue finally agreed upon by the parties. In it were noted also the nature of the action, the appearances of the parties in Court, and the acts of the Court itself during the hearing. This was called the Record; and the Records of all the actions of a particular term, when put together, constitute the Plea Roll of the term.

2. Of the Incompleteness of the Records in the Plea Rolls.

No one who reads through the many extracts from the Plea Rolls which are included in this series of volumes can fail to note the very large proportion of recorded actions which seem never to have reached any definite or actual conclusion. Even when they got as far as the joinder of a definite issue between the parties, and an order was made for the sheriff to summon a jury, the jury in a very large proportion of cases did not come. When the further continuance of an action depended upon a judgment to be delivered by the Court at an adjourned hearing, that judgment, as often as not, perhaps even oftener than not, was not delivered. The record tells us that time after time the hearing of an action is further adjourned because the Justices have not sufficiently advised themselves of their judgment; and often, after a certain number of such entries, nothing more is recorded; and, so far as is apparent, there has been in both cases, through the default of the jury in the one, through the neglect

of the Justices in the other, a failure of justice. It is not very easy to find a satisfactory explanation of all this. Certain hypotheses do, however, suggest themselves in some partial palliation, or, maybe, even complete justification of what was perhaps in many cases more apparently than really a failure of the Court to see that justice was finally, even though *claudo pede*, administered. We gather from sources of information other than the Plea Rolls and the Year Books that it sometimes happened that one of the parties to an action died while it was pending. The action would consequently come to an abrupt end; but the death of one of the parties and the consequent abatement of the writ and the surcease of all proceedings under it are not amongst the facts which were entered on the Roll. Consider, for example, the case of *Smythe* v. *The Abbot of Préaux*. The cause of action arose at Whitsuntide in the fourth year of the reign, 1311. The first hearing was in the Hilary term of 1313. Then there were prayers for aid and continuances until Michaelmas 1314, during all which time nothing seems to have been done in real furtherance of the action. Next we get delays by the Sheriff recorded, and there are further continuances to the Purification in 1317, when the defendant fails to appear. The Sheriff is ordered to arrest him, and there, with the note of a further adjournment to the Trinity term, the record ends. Here was plenty of time for the death of either the plaintiff or the defendant, or of both of them. Quite possibly the defendant's recorded failure to appear is to be accounted for by the fact that he was dead. And the uncompleted records of many cases extend through much longer periods of time than does that of *Smythe* v. *The Abbot of Préaux*. Another reason for the failure to get to a verdict and judgment, even when the case had got as far as a definite joinder of issue and an order for a jury, was doubtless the difficulty of getting juries to Westminster. A jury of the venue was ordered, and the venue might be anywhere throughout the length and breadth of England. To attend as a juror at Westminster was a serious matter; for jurors from the more distant counties a very serious matter. No allowance seems to have been granted to them for their expenses either of travelling or of board and lodging in London during the somewhat indefinite period of time which they might have to stay there before their case was called on. And who was to look after their farms or other business during their long absence from home? It is recorded in the Plea Rolls over and over again that the hearing of an action, after issue had been joined, was again and again adjourned *pro defectu iuratorum quia*

nullus venit. They would not come—one particular Sheriff in 8 Edward II told Parliament as much.[3] The Sheriffs, indeed, had certain powers for enforcing the attendance of jurors at Westminster, but they do not seem to have used them in practice, and perhaps not unnaturally. Further, we know that most of them were very ready to make matters easy for those who wanted to avoid their legal obligations and were ready to pay for being excused from them. And during all these repeated adjournments *pro defectu iuratorum* there was time enough for one or other of the parties to die and for the whole business consequently to come to an end. But nothing to this effect would be recorded. The record would simply be left incomplete. Now and again there were litigants who seem to have been unwilling to go on waiting any longer for a jury which they knew would never come. They wanted a definite end to the proceedings; a definite judgment on the matters in dispute between them. Since they could not get a jury of their own venue, they were willing to take the verdict of any twelve reputable and honest men; and so the record occasionally tells us that jurors chosen by agreement of the parties—*electi de assensu partium*—came and were charged by the Court and delivered their verdict, and upon that verdict judgment was given. Yet another reason suggests itself as a possible explanation of the absence from the Plea Roll of any record of a verdict and judgment after joinder of issue. The final hearing for taking the jury might have been adjourned to some future date at Westminster *nisi prius etc.*; that is unless the inquest were taken prior to that date by this or that Justice commissioned to hear and determine pleas in the periodical circuits. But it does not seem likely that this reason will account for much. It is seldom that the Plea Rolls of these years tell us that actions were adjourned *nisi prius*—and when we are told of such adjournments we are told also that the Justice in *nisi prius* returned, as it was his duty to do, the finding of the jury to the Justices at Westminster, where judgment was given upon it, and such verdict and judgment were enrolled.[4] Such entries are rare. More than this on this matter I do not, as at present advised, see my way usefully to say.

While speaking of juries taken before Justices of *nisi prius* a relevant word or two may be said in connexion with the case

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[3] *Rot. Parl.* I. p. 292, No. 15.

[4] 'And when such inquests be taken they shall be returned into the Bench, and there shall judgment be given and there they shall be enrolled.' Statute of Westminster II. c. xxx.

of *Annecy* v. *Yarmouth*. The nature of the action does not concern us here, and it is sufficient to say that the parties pleaded at Westminster up to a joinder of issue. Directions were given for a jury to be summoned to Westminster to try the issue on a definite day, unless the jury were taken by Trikingham J. in the country before that day. It was so taken in the country, and it found a verdict in favour of the plaintiff. Trikingham J., however, does not seem to have been as conversant with law and procedure as one would expect a Justice of the Common Bench to be. He took the jury in the absence of the defendant. He returned the verdict into the Bench for judgment to be delivered on it, and the plaintiff asked for seisin of the land to which the jury by its verdict had said that he was entitled. The defendant objected. A Justice sitting in Bank, he said, could not take an inquest in the absence of the defendant, and what a Justice sitting in Bank could not do a Justice sitting in the country could not do. On the other side it was argued that such a Justice had, under the terms of his official commission, no option. He could not, as a Justice sitting in Bank could, grant a *cape* against a defendant failing to appear. All that he could do was to take the inquest, and he could not do less than that.[5] But this argument did not convince Bereford C.J. He would not accept a verdict given in such circumstances, and he ordered the same jury to be summoned again to come to Westminster and there give a fresh verdict. It is interesting to compare the report with the record, the comparison bringing out once more the different purposes for which the report and the record were written. The report concerns itself solely with the legal argument as to the validity or invalidity of the verdict given in the country, and on the powers of a Justice of Assize. As this verdict was ruled to be invalid, neither it nor the proceedings in the country at which it was taken have any effect upon the ultimate issue of the action. They were merely passing matters of which no permanent record was wanted; and the Plea Roll consequently ignores them, dismissing them with the short statement that process had been continued between the parties, and that the jury between them was respited to a further date, because no juror came. It was not very likely that they would have come, for they had already given their attendance in the country and found a verdict. As that verdict had been set

[5] Sitting in *nisi prius* in 7 Edw. 3, Herle C.J. said that he had no power to go into facts: all that he was authorized to do was to take the inquest. 'In *nisi prius Herle* dit qe il ne puit trier le fait quar il nad power forsque a prendre lenqueste.' Fitzherbert, *Enqueste*, fo. 318d, case 46 (Trin. 7 Edw. 3).

aside, it was now necessary that they should attend at Westminster and return a fresh verdict there. And the Sheriff was bidden to see to it that they came. But beyond the surnames of the parties, the nature of the action, and the various dates there is no similarity between the report and the record.

3. Of Attornment, Homage, and the Writ of *per quae servicia.*

In view of some of the cases reported a note on the process and effect of attornment may be useful. Let us, to begin with, consider the usual circumstances in which a lord would ask, and as a rule would get, without any objection raised, the attornment of his tenant. A landlord, whom we will call A, leases tenements to B in consideration of certain services, which would usually be a yearly rent in money and the rendering of homage. A afterwards conveys his rights in these tenements to C, usually by a fine made in Court, including, of course, the right to the services due from B. A at the same time makes to C a formal declaration, or conusance, of what those services due from B are. C then serves a writ of *per quae servicia* on B calling upon him to acknowledge by what services he held his tenements from A, and to attorn and do homage to him, C, to whom A has conveyed all his rights in the tenements. Attornment simply means recognizing the person to whom you attorn yourself as your immediate lord to whom the services due from your land are payable. The doing of homage is the natural and legal consequence of attornment. The immediate importance to the lord of his tenant's attornment was the fact that he could not distrain for rent in arrear unless his tenant had actually attorned himself to him as his tenant. As a rule the tenant did so without any demur, but there were cases when he refused to attorn voluntarily, as we shall see presently. Much stress was laid on homage as being the tie of feudal connexion between lord and tenant. It is defined by Bracton (fo. 78b) as being that legal bond by which a lord is held and bound to warrant, defend and quiet his tenant in his seisin against all mankind, in consideration of the tenant's covenanted services; and, on the other hand, as being that obligation by which a tenant was on his side bound to preserve his faith to his proper lord and to do his proper service. Unless a lord had received his tenant's homage he could not enforce payment of the services due from the tenements. Homage was not due for a tenement which was held only for a term, which included an estate for a life term, but

fealty only.[6] A lord was entitled to the escheat of the lands held from him by a tenant committing a felony, but only if such tenant were his homager. Certain tenures, such as tenure by knight's service and the peculiar tenure by 'cornage,' an instance of which occurs in the case of *Derwentwater* v. *Boys*, entitled the lord to the wardship and marriage of an infant heir, provided the heir's father died in the lord's homage. It was an important matter, consequently, for the lord that when any land held of him was conveyed by purchase to a new tenant such purchaser should not only acknowledge by what services he held the lands, but should, by attornment to him, recognize him as his lord; and then, by doing homage, put him into full enjoyment of a lord's rights. Homage was not to be done in private, but in some public place to which everyone had access, as in the Court at Westminster or in the county or hundred Court, or in the Court of the lord himself, in the presence of many persons, so that the lord might have witnesses of the tenant being bound to him. On the other hand, if a lord refused to accept the tenant's homage, with its attendant responsibilities, the tenant had several remedies. In the first place the rent and other services were lost to the lord, for the tenant was not bound to pay them unless his homage had been received; and, further, the tenant could have a writ against the lord calling upon him to receive his homage, and the Court would, unless it saw some good reason to the contrary, force him to do so. In this case the refractory lord lost all right to the services in arrear. If a tenant's homage were refused publicly by his immediate lord a tenant might attorn himself to the next superior lord, and, if he refused, then to the next; and so on to the King, who was the chief lord of all; and, if they all refused, the tenant was quit of all demands for services. But should any of these lords accept the tenant's homage, then the immediate lord who had arbitrarily and wilfully refused it could never recover either homage or service, though he would still, by reason of such arbitrary and wilful refusal to accept the homage, be bound to warranty, notwithstanding the fact that the higher

[6] The oath taken by the homager was in the form following: 'Deuenio homo vester de tenemento quod de vobis teneo et tenere debeo et fidem vobis portabo de vita et membris et terreno honore contra omnes gentes salua fide debita domino regi et heredibus suis.' The oath of fealty, which was taken after the oath of homage, was: 'Hoc audis domine N. quod fidem vobis portabo de vita et membris, corpore et catallis et terreno honore: sic me Deus adiuuet et haec Sancta Dei euangelia.' The difference between homage and fealty was that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his *faith* to his lord; in the oath of homage he said in addition, 'deuenio homo vester'—that is, he became his homager.

lord who had accepted the homage was in actual receipt of the services. The instructive case of *Trillawe* v. *Mirie* affords us an instance of a tenant objecting to attorn himself; and as the circumstances are somewhat complicated, a few words may be said in elucidation of them. We have two independent reports of the case, and one helps the other out. We find John Mirie as actual tenant in possession of certain tenements of which he had been enfeoffed by one Lawrence, his immediate predecessor as occupying tenant. In these tenements a certain rent-service was payable to James Cranley as chief lord. By a fine made in Court, James conveyed his right in these services to John Trillawe, and he made a formal declaration or conusance of what these services were. John Trillawe then issued his writ of *per quae servicia* against John Mirie calling upon him to acknowledge by what services he had held the tenements of James Cranley, and to attorn to himself, John Trillawe, as being now, in virtue of the fine made by James Cranley, chief lord. John Mirie objected to do either the one or the other. James Cranley, he said, could not give to John Trillawe what he did not himself possess, and he had never possessed these services for he had never had any seisin of them; and, in substantiation of this objection, he asserted that he had never attorned himself to James Cranley, had never done homage to him, and had never rendered him any services. What seems to be at the back of John Mirie's mind is a belief that if, on this technical plea, he could escape being made to attorn and do homage to John Trillawe he would be able to hold the tenements henceforth in demesne free of all services. If, he urged, John Trillawe can make me attorn to him he will get the fee and right in the tenements, and the possession of my attornment and homage, which James Cranley, his vendor, never had; and he will consequently be in a better position than James Cranley himself was. In other words John Trillawe would have obtained by purchase from James Cranley something which James Cranley had not got to sell, which John Mirie maintained was not an arguable proposition. Bereford C.J. at first seemed to be of opinion that Mirie's contention was a strong one. Trillawe, he said, could get no support from the Common Law. If he had any case at all it must be based on statute. In an earlier case, where very much the same question seems to have arisen, he had expressed a strong opinion, amounting, it would seem, to a judicial ruling. 'If, after the death of my ancestor, I grant the services of my tenant who has never attorned to me of these services, do you suppose that the law will force him, by virtue of my grant, to attorn himself to

my grantee in respect of these services, before I have had seisin of them myself? Certainly not.'[7] Inge J. looked at the matter from a point of view more adverse to Mirie. 'Unless you attorn to John Trillawe,' he said, 'by virtue of James Cranley's conusance, it will follow that you will be a tenant without a lord, which is an impossibility, for lordship and tenancy are two correlatives, neither of which can exist without the other'; a purely theoretical argument which could scarcely have carried conviction to John Mirie's mind, and to which he might have fairly replied that, though it might be and no doubt was true that every tenant must have a lord, yet that was no good reason for imposing John Trillawe upon him as his lord, John Trillawe who had nothing more to say in support of his claim than that he had bought rights from James Cranley which Cranley himself did not possess and could not, therefore, sell to Trillawe or to anyone else. There was always the King, who was undoubtedly lord paramount of every inch of land in his kingdom. Why should not he, John Mirie, in default of any rightful mesne lord, hold his land directly of the King in demesne? Perhaps this line of argument is involved in his question, 'Why should I attorn to anyone?' There was a good deal more discussion and much arguing *pro* and *con*. In the end the matter seems to have been settled by recourse to the provisions of the Statute *Quia Emptores*. By force of that statute John Mirie had necessarily been enfeoffed by Lawrence to hold of the chief lord of the fee. James Cranley was that chief lord, and James Cranley had been seised of the services by Lawrence; and, it was contended, that though the services be a long time in arrear and the feoffee have feoffed over the lord is not out of possession where he has once been seised; and Toudeby made the very doubtful assertion that though the tenant had not attorned, and, consequently, had not done homage, the lord would have wardship and marriage and escheat, an assertion which to the present annotator seems to require much qualification. Bereford C.J., in a reasoned judgment, came to the conclusion that by the provisions of *Quia Emptores* John Mirie was the tenant of right of the chief lord, though that chief lord had never been seised of his services; and he advised the parties to come to an agreement. And afterwards they were agreed, and John Mirie came into Court and did homage to John Trillawe after the established form and fashion.

[7] '*Ber.* Apres le mort mon auncestre si ieo graunt les seruices mon tenaunt qe ne fut onqes attourne a moy des seruices quides qe la ley luy chasera dattouance des seruices par mon graunt auanant ceo qe ieo aye receiue [*v.l.* desreigne] les seruices etc. Non fra etc.' Fitzherbert, *Attournement*, fo. 96d, case 15; and *Year Book Series*, I, p. 80.

But the case still remains somewhat obscure, and the record in the Plea Roll does not give us the smallest assistance to a better understanding of it.

4. On the Representation of the King in Court.

Elsewhere [8] I have discussed what seems to have been a received theory in medieval times touching the representation of the King when he was a litigant in his own Courts; and I there adduced such evidence as was known to me in proof that the mediaeval theory was, in fact, such as I have there set it out. This theory was, shortly, that, as every subject of the King is bound on his allegiance to stand by his Sovereign, to render him all personal service and to defend him against all men, every one of the King's subjects has some sort of *locus standi* entitling him, if he happen to be in Court during the hearing of any case in which the King's interests are involved, to constitute himself there and then, without instructions from anyone, the King's representative, to sue on behalf of the King— *sequi pro domino Rege*. I think that in what I have written elsewhere I had more or less assumed that a subject of the King, present in Court, could take upon himself such a function only if the King were not already represented. The possibility of a dozen or more loyal subjects all anxious to take points on behalf of their Sovereign lord seems suggestive of pandemonium. I am a little doubtful now, however, if that earlier assumption is theoretically tenable. Another action, *Ballingham* v. *Burghill*, is instructive, and carries the matter a little further than the cases which I have discussed elsewhere. The general facts of that case need not be set out here, but much turned upon a fine in which certain tenements, part of the King's manor of Wormelow and ancient demesne, were said to be held at the Common Law. The Court, in hearing the present action, declared that the fine had been made in deceit of the Court, no grant or licence authorizing such alienation of a parcel of his manor having been produced; and Inge J., as the Court's mouthpiece, asked if there were anyone present who desired to protect the King's interests. Miggeley S. offered to aver on behalf of the King that the tenements were of the ancient demesne; but he was reminded that he could not do that, the fine still being valid as it had not been annulled, and averment contrary to the tenor of a solemnly levied fine was not allowable. Miggeley did

[8] *Year Book Series*, xvii, pp. xi, xii.

not seem inclined to carry the matter further, thereupon Bereford C.J. said: 'In these circumstances we would willingly receive the humblest man of the people to challenge the fine and seek its annulment on behalf of the King.' From which it seems fairly inferable that if a subject of the King were present in Court in a case where it appeared that the King's interests were involved he might intervene with what argument or application on the King's behalf he thought desirable or necessary, if the counsel who was professedly charging himself with the advancement or defence of the King's interests himself failed to urge them.

W. C. Bolland.

AESTIMATUM.[1]

IN a study of any institution it is commonly well to begin with a definition or description of the phenomenon studied. But the following pages will perhaps explain why, in the present case, this course has not been followed.

The story of the innominate contracts as a group and in detail is full of puzzles. The history of their evolution has been completely recast in recent years and is still matter of acute controversy. Of *Permutatio* it is doubtful whether we know much of the classical view of the matter. Of *Precarium* it has been said that it is an enigma (see the references in Bertolini, *Obbligazioni*, Parte speciale, p. 420). Indeed it is hard to see any reason for its regular appearance in the lists except the fact that Justinian gave an *actio praescriptis verbis*. It is lacking in the essential quality of innominate contracts, mutuality of service. On the other hand Thaller tells us (*Mél. Appleton*, p. 645) that 'ce qui ne tient plus de l'énigme, c'est la convention d'*Aestimatum*' and yet the story told in the comparatively small number of texts which deal with or are supposed to deal with it is of such a conflicting character that this institution would seem to be as enigmatic as any of the others. These texts appear to be: P. Sent. 2, 4. 4; Inst. J. 4. 6. 28; D. 12. 1. 4. pr.; h. t. 11. pr.; D. 14. 4. 5. 18; D. 17. 2. 44; h. t. 52. 7; D. 19. 3. 1 and 2; D. 19. 5. 13. pr.; h. t. 17. 1. When these are severally examined it becomes possible to think that some of the difficulty is caused by applying to this convention certain texts which have nothing to do with it, and by treating the history of *Aestimatum* as a part of the history of Innominate contracts, whereas this institution seems to have had a distinct and much earlier evolution, and to be in strictness not an innominate contract at all.

Ulpian, who is our chief authority and who tells us of the *actio de aestimato*, says of this transaction that it is doubtful under which of two contracts it should come *utrum ex vendito... an ex locato*—and that this action was introduced *tollendae dubitationis gratia* (D. 19. 3. 1. pr.). The later part of the

[1] This article was published in " Mélanges de Droit Romain " presented to Professor Georges Cornil. It is reprinted here with the kind permission of the editors so as to make it more available to English readers.

text may well be an interpolation, but that does not affect these propositions. Yet, in another text, dealing with what is commonly held to be the same kind of case, he says that it does not come under certain contracts which he enumerates (*mandatum*, *societas*, D. 19. 5. 13. pr.) and lays it down that an *actio in factum* lies, apparently knowing nothing of the *actio de aestimato*. In one text he tells us that the risk is on the receiver (D. 19. 3. 1. 1). In another he says what may mean that the risk is on the principal (D. 12. 1. 11. pr.); in another that it is on the party who initiated the transaction (D. 19. 5. 17. 1), and the same doctrine is stated by Paul in his *Sententiae* (P. 2. 4. 4) which, whether in their original form or no, are independent of Tribonian. If there was doubt as to which was the initiator, Ulpian makes the receiver liable for *culpa*, which puts the risk on the principal (D. 19. 5. 17. 1). In one text Ulpian tells us, giving reasons, that such a transaction is not *societas* (D. 19. 5. 13. pr.). In another he tells us that if it was entered on *animo societatis*, it is *societas* (D. 17. 2. 44). All these discrepancies can be readily disposed of by assuming free interpolation, and interpolations there have certainly been. But the interpolations that can be reasonably considered as proved hardly go beyond a reference to the *actio praescriptis verbis* (D. 19. 3. 1), and it is a far cry from a hasty and characteristic insertion of this sort to the acceptance of wholly unproved interpolations which would sweep the whole institution out of the classical law. It seems at least as probable that the true inference is that more than one state of facts is contemplated in these texts.

A transaction in which property is handed over for sale at a fixed price, at which those articles must be accounted for which are not returned, may assume many shapes and contain many different detailed terms. It may be *societas*, or sale or mandate, and all these would equally well come within the scope of the expression '*rem vendendam accipere* (*dare*)' which appears in so many of the texts (D. 12. 1. 4. pr.; h. t. 11. pr.; D. 14. 4. 5. 18; D. 17. 2. 44; D. 19. 5. 13. pr.). In some of the cases it seems quite clear that we are not dealing with *aestimatum* at all. In D. 12. 1. 4. pr. nothing whatever is said of *aestimatio*. The thing is handed over to a man who wants to borrow in order that he may use as a loan the price he receives on sale of the thing. The risk is on him, a very rational decision, but one that has nothing to do with our question. In *h. t.* 11. pr. the same case is discussed in more detail and the point is brought out that it makes some difference whether or not there was

a general purpose of selling apart from this proposed loan. All this has nothing to do with *aestimatum*. So, too, in D. 19. 5. 19. pr. nothing is said of *aestimatio*. Betti, indeed (*Valore dommatico della categoria 'contrahere,'* p. 32), inserts the word *aestimata*. There seems no justification for this. The facts are the same, but the point raised is different: it is the question what is to happen if he changes his mind and either does not sell the thing or, having sold it, does not adopt the price as a *mutuum*. The solution, whether classical or not, does not concern us: the case has nothing to do with *aestimatum*.

But these *mutuum* texts are not the only ones to be eliminated. It will be assumed for the present that the *actio de aestimato*, whatever its character, was actually set out in the Edict (see Lenel, *Edictum Perpetuum* (2) pp. 290 sq. referring to the twice repeated *proponitur*, D. 19. 3. 1. pr.; Inst. 4. 6. 28 and also to the contrasting *competit* for *permutatio*). It is true that some of Lenel's observations are less convincing: in particular the acceptance of the *actio de aestimato* as the earliest *actio praescriptis verbis*, and as appearing as a paradigm for all the others. That it did in fact serve in later years as a suggestion for the *actio praescriptis verbis* is probable, but that is a very different matter. The view, indeed, ignores a very substantial distinction indicated clearly enough in the texts. It is one thing to provide in the Edict a *formula* for cases as to which it is uncertain under which of the recognised contracts they should be placed, and this is what happened in the matter of *aestimatum* (D. 19. 3. 1. pr.). It is quite another to provide a *formula*, even on the same lines, for facts as to which no one contends that they come under any existing contract, and this is what the *actio praescriptis verbis* does. It is true that Beseler (*Beiträge*, 2. 161; 4. 135) considers the whole of the last-mentioned text, the main basis of the view here expressed, to be compiler's work, and he adds, in words that express precisely the false preconception above indicated, that the *actio aestimatoria* is 'wie iede actio praescriptis verbis nicht nur dem Edikte sondern ueberhaupt dem klassischen Rechte fremd.' To the apparently sound criticism of Meylan (*Origine et nature de l'actio praescriptis verbis*, p. 102), that this is essentially a *petitio principii*, he replies that this is to assume that one who expresses a view without giving a reason has no reason to give, and that one who had read his remarks carefully would have seen the reasons. The present writer has presumably not been careful or acute enough, for he has not found them in the passage to which Meylan refers (Beseler, *Beiträge*, 2. 160), and what appears in

Beiträge 4. 135 is evidence of clumsy latinity, which is indeed sufficient for Beseler, but to most people seems quite inadequate. And there is no reference to what seems the significant fact that the book of *Ulpiani ad Edictum* from which this passage purports to be taken is precisely that in which he discusses sale and hire, the contracts referred to in the passage, and nothing else, except just this case of *aestimatum*. It may be added that D. 17. 2. 52. 7, discussed by both Beseler and Meylan, has not even externally any relation to *aestimatum*.

Another point which seems to be basic is that, as appears from the name of the action, the essential point in the transaction is the *aestimatio*. *Aestimatum* is not a notion confined to this relation. The case of *dos aestimata* and the effect of the *aestimatio* on the risks is well known (Girard, *Manuel*, (7) p. 1007). (See also, for a list of the recorded cases of *aestimatio*, Ihering, *Œuvres choisies*, pp. 271 sq.) In D. 19. 2. 3, where the *conductor praedii* takes the *instrumentum* at a valuation, the effect is the same: the risk is on him. As in *dos*, it is essentially a sale. So, too, in *commodatum*, where the thing is taken over *aestimatam*, the same notion is applied (D. 13. 6. 5. 3), and it is to be noted that here it can be thought of as a sale only in so far as to make this notion applicable, for, in the ordinary course of things, the subject-matter will be returned. In *societas* we have the same principle applied with a slight modification due to the *fraternitas* involved in *societas* (D. 17. 2. 52. 3, *quamvis aestimata*). In strict conformity with this principle, Ulpian tells us in his discussion of the present relation, 'aestimatio autem periculum facit eius qui accepit, aut igitur ipsam rem debebit incorruptam reddere aut aestimationem de qua convenit' (D. 19. 3. 1. 1). These considerations entitle us to rule out all texts in which there is no *aestimatio*. Here it is to be observed that to receive a thing with authority to sell it at a certain price and instructions to bring it back if that price cannot be got, is not in itself a case of this *negotium* at all. In general, for instance, any mandate for sale will have such a limit of price. But a mandatary who was asked, on his own suggestion or not, to drive a cow to market and to sell it at not less than £20, and as much more as he could get, would be surprised if he was told that if the cow died on the way by accident he would have to pay for it. Obviously the rules of the *actio de aestimata* would have no bearing on such a case. We can therefore eliminate as having nothing to do with our *negotium*: D. 19. 5. 13. pr., where though there is a minimum price there is no question of typical

aestimatum (it would be mandate but for his possible share in the price obtained); D. 17. 2. 44, where the facts are of exactly the same kind, there is no *aestimatum*; D. 14. 4. 5. 18, where there is even no stated limit of price.

This leaves us with P. Sent. 2. 4. 4; Inst. Just. 4. 6. 28; D. 19. 3, passim; D. 19. 5. 17. 1. The first point that emerges from this elimination is that there is no real reason to doubt that the Edict 'proposed' a special action in this case, the *actio de aestimato*, and that it was a *bonae fidei* proceeding. This is clearly stated by Ulpian in D. 19. 3. 1. pr. and Inst. Just. 4. 6. 28. It has, however, been maintained on a comparison of D. 19. 3. 1. pr. cit. with 19. 5. 13. pr. cit., that classical law knew only an *actio in factum* in our case (see *e.g.* de Francisci, Synallagma, I, p. 94, cited and adopted by Partsch Z. S. S., 1914, p. 337, 'wohl mit Recht'). But if, as is above suggested, D. 19. 5. 13. pr. has nothing whatever to do with *aestimatum*, the argument drawn from this text falls to the ground. The argument is indeed an expression of the view above rejected that the *actio de aestimato* is to be regarded as the *actio praescriptis verbis*. That it belongs to a different sort of group of facts is what is here maintained. That it served as a suggestion is probable enough. It may be admitted that most if not all of the references to the *actio praescriptis verbis* are interpolated: it is fairly clear that all the allusions to this action in connexion with *aestimatum* are due to Justinian (Inst. 4. 6. 28; D. 19. 3. 1. pr. in f.; D. 19. 5. 17. 1 in f.). This in no way justifies the view that the *actio de aestimato*, contrary to the affirmations in the texts, was an *actio in factum*. No doubt with the generalization of the *actio praescriptis verbis* the *actio de aestimato* became unimportant, and thus little is said of it.

An apparent conflict of Ulpian with himself (D. 19. 5. 13. pr.; D. 17. 2. 44) hardly concerns us, for, on the view here taken, neither of the texts deals with *aestimatum*. In the first cited a certain transaction is said, for reasons given, not to be *societas*. In the other, one which looks much the same is said to be *societas* if the parties so intend. But while the facts of the two cases, so far as they are stated, seem identical, and thus to call for the same solution and yet receive opposite ones, there is in fact no conflict. The proposition in 13. pr. cit. bases the view that it is not *societas* on the intent of the parties, inferred from the facts stated: all that 44 cit. says is that it is a matter of intent, and if the parties so intend, which is a question of evidence, it may be *societas*. Interpolation is, however, not to be

excluded. But, with all these eliminations, there remain awkward questions in the matter of risks. Three texts deal with it in connexion with *aestimatum*. In one of them Ulpian, in the *sedes materiae* (D. 19. 3. 1. 1), applying the regular rule as to the effect of delivery *aestimatum*, holds that the risk is on the receiver. In another, basing himself on Labeo and Pomponius, he puts it on whichever of them initiated the transaction (D. 19. 5. 17. 1), and Paul in the only text independent of Justinian says the same thing. Dernburg (Pand. 2, Sect. 120, n. 8) thinks the latter the true rule, the other being a general statement of the effect of *aestimatio*, which Ulpian in fact modified for the particular case, in words which the compilers have struck out. It is not easy to see why the compilers should have struck the words out, and it is noticeable that both the texts of Ulpian are from the same mass, the Sabinian, and that the simpler rule applying the strict rule of *aestimatio* is in the *sedes materiae*. It will be observed that the two texts which make the *periculum* turn on initiation are much alike in language and both deal with the case in connexion with *commodatum*, which is not one of the contracts with which the texts state *aestimatum*, or the analogous cases dealt with, to have an affinity (sale, hire, mandate, *societas*, D. 19. 3. 1. pr.; D. 19. 5. 13. pr.). They are alike also in that neither of them has any suggestion of the type of business which seems to be of the essence of *Aestimatum*, Troedelvertrag, *i.e.* the idea that the taker has a minimum price at which he is entitled to buy the goods, the intent being that the pedlar shall do the best he can for himself with them, the *aestimatio* being a sum for which he is to account for them if he does not restore them. In these two cases there is merely the handing over of a thing, *aestimata*, to be sold and the price accounted for if it is not returned, and it is not by any means clear that the *actio de aestimato* has any application. If, indeed, the transaction were of the normal type in which the pedlar or retailer takes the thing with a view to selling at a higher price than the *aestimatio* it would be absurd to make the question of risks depend on the answer to the question, Who made the first move in the matter? But it is very different where what has happened is that A has asked B to offer the thing to X, or any other likely customer at a certain price. Here it is an ordinary mandate, and the risk is naturally on the *mandator*. If, however, B approaches A and asks to be allowed to take the thing and offer it to someone he has in mind at a price agreed by A, there is no question of mandate. Here, as in all the recorded cases in which the

taking the *rem aestimatam* carries the risks, he is taking it for his own purposes (*dos, colonus, commodatum* and *aestimatum* seem to be the cases), and the ordinary rule that *aestimatio* carries the risks is of course applied. But it does not in the least follow that the action, or actions, in the minds of Paul and Ulpian when they wrote these passages was the *actio de aestimato*. The context in both cases suggests that it was not.

W. W. Buckland.

THE PASSING OF THE PROPERTY AND THE RISK UNDER A C.I.F. CONTRACT.

IN view of the misapprehension that seems to exist on this subject, more particularly in otherwise well-informed circles abroad, perhaps it may not be out of place to attempt a reconsideration here of the question from the point of view of first principles.

In the first place, it is to be observed that the question which primarily interests Continental students of English commercial law, namely, when does the risk pass, turns wholly in our law on the time of the passing of the property. In certain circumstances, it is true, the risk may be in one party to a sale of goods and the property in the other,[1] but in a c.i.f. contract we are not concerned with them. The possibilities discussed by Benjamin[2] in this connexion do not affect c.i.f. contracts. The rule of the common law, therefore, embodied in the Sale of Goods Act, 1893 (section 20), remains for all practical purposes the invariable rule. The goods remain at the seller's risk until the property in them is transferred to the buyer.

The time for the passing of the property in all contracts for the sale of goods depends on the intention of the parties.[3] This implies that in the case of any and every specific contract brought to the notice of the Courts the question is ultimately one of fact. No general rule can be applied merely mechanically. All the circumstances of the particular case have to be taken into account.[4] C.i.f. contracts form no exception to the rule. But it is possible to deduce from the nature of the contract certain rules which govern intention. Where the parties have failed to express any particular intention, they may be taken to have intended what the nature of the contract itself would imply.

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[1] 'As a general rule, *res perit domino*, the old civil law maxim, is the maxim of our law; and when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is . . . But the two are not inseparable. It may very well be that the property shall be in the one and the risk in the other,' *per* Blackburn J. in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. 436, at p. 454. See also Chalmers' 'Sale of Goods Act' (10th ed.), pp. 68, 69.

[2] See 'Benjamin on Sale' (6th ed.), pp. 451—458.

[3] See Sale of Goods Act, s. 17, sub-s. 1, p. 57 in Chalmers' (10th ed.), and Benjamin, *op. cit.* p. 351.

[4] Sale of Goods Act, s. 17, sub-s. 2, says: 'For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.'

It is all the more necessary to seek to determine such general rules, because of the great variety of contracts which purport to be made on c.i.f. terms. A large number of different trades avail themselves of this form of contract, but they differ enormously among themselves. Some are highly organized, with well-settled model contracts. It is with these contracts, perhaps, that bankers are more familiar than with other equally good c.i.f. sales. Some, again, without having model contracts, employ a more or less standard form, subject to well-understood trade customs. In fact, the range is a wide one, till eventually we come to individual transactions where the letters c.i.f. are practically the only express indication of the terms of the sale.

We begin, then, with the common law rules as embodied in the Sale of Goods Act (see sections 16-20). The property cannot pass until goods of the contract description, ascertained and in a deliverable state, are unconditionally appropriated to the contract.[5] *Prima facie* delivery of such goods to the carrier is an unconditional appropriation,[6] but not necessarily. The seller may reserve a right of disposal, and he is taken to do so when the bill of lading is made out in his own name or that of his agent.[7] As a c.i.f. contract is a contract for the sale of goods by delivery of documents,[8] the question of the passing of the property will turn largely on the reservation of a right of disposal by means of the documents; and so we come to the three propositions on the subject laid down by Kennedy L.J. in *Biddell Brothers* v. *E. Clemens Horst & Co.*[9] *Prima facie* the property in the goods passes on shipment. It may pass either conditionally or unconditionally. (1) It passes conditionally where the bill of lading is made out for the purpose of better securing payment of the price in favour of the seller, his agent or representative. (2) Where the property passes conditionally at shipment, it subsequently passes absolutely on tender of the price in exchange for the documents. (3) It passes unconditionally where the bill of lading is made out in favour of the buyer, his agent or representative.

These by now celebrated propositions will repay careful

[5] Sale of Goods Act, s. 18, rule 5 (1).
[6] *Ibid.*, rule 5 (2).
[7] Sale of Goods Act, s. 19, sub-ss. 1, 2.
[8] See the cases cited in the writer's 'C.I.F. Contracts' (2nd ed.), pp. 1—4, and more especially *Arnhold, Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* [1916] 1 K. B. 495, at p. 510.
[9] [1911] 1 K. B. 934, at p. 952; [1912] A. C. 18; 'C.I.F. Contracts' (2nd ed.), p. 64.

scrutiny. No more than a cursory examination, however, will be attempted here. Taking the last proposition first, it is to be noted, in the first place, that, as a matter of practice, a bill of lading is not usually taken in the buyer's name. Much more usual, at any rate, is it for the bill to be made out in the seller's name and then indorsed. But whether this be so or not, the proposition, as stated, calls for some qualification. The property *may* pass unconditionally in this way, but not necessarily so. The seller is still entitled to treat the documents as security for payment until tender, and in practice that is what he would seem to be doing. The very act of tender so as to obtain the price would argue as much. The seller is, as it were, saying: 'He shall have the goods if he pays for them.' It would hardly be necessary to stress the point but for the argument that can be based upon a suggestion thrown out in *The Parchim*[10]—that the holding of the documents by the seller until tender need not imply a withholding of the property, but only a retention of a right of lien. The seller is content to have parted with the property, because he still has a right of action for the price. The distinction involved is undoubtedly a lawyer-like one, but too much must not be made of it. Does the ordinary business man want a right of action, an expensive right at best, especially where the resale of the documents is so simple a remedy, involving hardly any additional expense whatsoever? He would certainly repudiate such an intention once he were made aware of it. Besides, the common sense of the position indicated above—'he shall not have the goods unless he pays for them'—harmonizes well with legal ideas that are of immemorial antiquity in this branch of the law. Property in goods and the passing of the property as the very object of the contract, go back in terms some 500 years.[11] Law as old as this must be deeply rooted in the habits of the people,

[10] [1918] A. C. 157. 'The way in which the seller subsequently deals with the bills of lading points rather to a desire to support his lien than to a desire to retain the property or any *ius disponendi* incident to the property. As soon as the bills of lading arrive in Europe he places them at the buyer's disposal, subject only to payment of the purchase price at due date,' p. 172. It should be noted that the distinction here drawn arises out of the peculiar facts of this case and is not intended to be of wider application, though of course the argument discussed in the text may be legitimately based upon it.

[11] See *Cochrane* v. *Moore*, L. R. 25 Q. B. D. 57, Fry L.J. at p. 59, and particularly the case from 2 Edw. IV, at p. 68. See also Holdsworth, 'History of English Law,' iii, pp. 281—284. 'In Henry VI's reign, however, we find it clearly stated that upon an agreement to sell a specific chattel the vendor may sue in debt and the purchaser in detinue. The right to get the chattel gave a right to sue in detinue. . . . It is clear that this is a departure from the old law and an extension of the actions of debt and detinue. It is possible that if we look closely at these extensions we shall see the origin of the doctrine that a contract of sale of specific goods passes the property in the goods,' p. 282.

and might well be appealed to to explain intention where the parties have given no express indication. The modern refinement suggested in *The Parchim* (where incidentally the contract in question was only doubtfully c.i.f.) may well then be left on one side. At best it is only capable of very special application. Finally, there is the authority of a *dictum* of Scrutton J. in *Karberg* v. *Blythe, Green*[12]: 'If the seller has taken a bill of lading in the purchaser's name, but retains it as security for the price, the property appears to vest on the buyer's tendering the price.'

With regard to the second proposition, no more need be said here than that a conditional passing of the property implies that the property remains in the seller until the condition be fulfilled. It will be contended below that the act of tendering the documents to obtain the price implies a condition that the buyer is not to have the documents unless he in fact pays the price. If that is so, in every c.i.f. contract there is only a conditional passing of the property on shipment.

There is left only the second proposition—that the property passes absolutely on tender of the price in exchange for the documents. This proposition is to be taken as formulating the general rule. If any one rule can be laid down as to the time of the passing of the property under a c.i.f. contract, it will centre round the time of tender, and will be this: When the cash is tendered in exchange for the documents the property passes.

Quite apart from the firm authority on which the proposition is based, it is worthy of support for a number of good reasons. It first of all has the advantage of being a simple statement of broad principle easily intelligible to all, lawyer and business man alike. Then it is capable of practically universal application, business practice being what it is. Moreover, though having its origins in the peculiarities of English law, it possesses the breadth and clarity more usually associated with civil law systems, to which in this case it can be readily assimilated. But to treat of more immediate considerations first. For one thing it gets rid of much unnecessary technicality, and can be shown to cover a number of exceptional cases peculiar to this type of contract. For example, the seller may tender the documents, though to his knowledge the goods have been destroyed.[13] Can there be property in non-existing

[12] [1915] 2 K. B. 379, at p. 387.

[13] See *Manbre Saccharine Co., Lim.* v. *Corn Products Co., Lim.* [1919] 1 K. B. 198; *Clark* v. *Cox, McEuen & Co.* [1921] 1 K. B. 139.

goods? The rule avoids the necessity of facing a conundrum such as this. Again, many c.i.f. contracts are sales of goods afloat; there can be no question in such a case of the property passing on shipment, because the seller cannot then have appropriated the goods to the contract. The allocation takes place at tender, and not before.[14] It is not necessary to multiply instances. Again, it avoids unnecessary artificiality and the consequent complications. 'Property,' despite its familiarity, must suffer from the defects of all abstract conceptions. When a man buys goods he wants to have the goods, and be able to dispose of them as he wills. His power to do this without let or hindrance is denoted by saying that the 'property' in the goods is in him. In so far as the term indicates this and no more, it is a convenient and useful expression. Anything beyond this is apt to involve subtleties which are quite out of place in a plain man's subject like commercial law. The term needs chaining down, so to speak, to something tangible and concrete. Fortunately, in the case of c.i.f. contracts, this can be done, and more readily, perhaps, than in the case of any other contract. The bill of lading is the tangible symbol of the property in the goods. As the Bills of Lading Act, 1855, puts it, 'Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee.' If the endorsing over of the bill of lading passes the property according to the custom of merchants—a custom not confined, of course, to English merchants—why seek for any other time for the passing of the property than that when the bill of lading is transferred to the buyer? It would only add confusion to have the property in the goods passing at one time (say, on shipment) and the symbol of the property, by which alone the benefits of the property can be obtained, passing at another. And if two occasions such as these can be distinguished, why should not the documents be transferred at one time and the property in them pass at another? To subtleties such as these there is no end.

It only remains to consider very briefly certain other views that have been put forward. The view is sometimes maintained, more especially by those Continental lawyers anxious to find a common principle between English and Continental systems on which to base international rules, that the property passes on delivery to the carrier. They base themselves on the rule in the Sale of Goods Act (s. 18, rule 5 (2)), which says that delivery

[14] *Cf. Groom* v. *Barber* [1915] 1 K. B. 316.

of the goods to the carrier for the purpose of transmission to the buyer is deemed to be an unconditional appropriation to the contract, and so to pass the property. Without discussing the desirability of making delivery to the carrier the means of passing property under any international rules that may commend themselves, it cannot be too strongly insisted that such is not the English law. There is no delivery in any sense of the word under a c.i.f. contract until the seller has discharged his primary obligation of shipping on board ship goods of the contract description.[15] The Courts allow of no lax interpretation of 'shipping,' so as to include delivery to a shipping company for shipment, or anything of the kind.[16] Much the same applies to the suggestion that the property passes when the goods are placed alongside the ship. There is no authority whatsoever for this proposition; in fact, it is in flagrant contradiction to well settled law. Again, it has been said that the property passes when the buyer receives notice of shipment. This is based presumably on the words in Rule 5 (1) (Sale of Goods Act, s. 18), relating to the assent of the buyer. But for the many reasons that can be deduced from the general considerations above, this view is equally untenable. One wonders why it is necessary, even for the sake of international agreement, to countenance distorted views such as these, when the broad principle laid down above turns upon the one feature of a c.i.f. contract that must be common to the business practices of all nations.

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[15] See *Johnson* v. *Taylor Brothers* [1920] A. C. 144. 'In the present instance the refusal to ship the goods is, in my opinion, the whole of the breach. Unless and until the goods are shipped, the shipping documents cannot come into existence, and refusal to tender such documents is consequent upon the refusal to put the goods on board. It is perfectly true that without the documents the title to the goods is not complete, that delivery is not effected, and it may be that in an action for non-delivery of the documents the measure of damages would be the same as that for non-delivery of the goods': Lord Buckmaster, at p. 160.

[16] See 'C.I.F. Contracts,' pp. 13 *et seq.*

TENANT BY THE CURTESY OF ENGLAND.*

THE torrent of legislation which has recently descended on this fortunate land has not left untouched the estate of tenant by the curtesy, the most interesting of all estates given by the law as act of law.

Southern Ireland, indeed, having by its wilful act cut itself off from the Union, has deprived itself of the blessings of this legislation; in that country, therefore, curtesy will remain as it has done from time immemorial, and the Bench and Bar of the Irish Free State, and, indeed, of Northern Ireland,[1] will not for the next two or three hundred years be engaged in construing this legislation and the hardy annuals it must produce.

But as applied to England and Wales, the new legislation has at once enlarged the subject matter in which curtesy can exist, and restricted the occasions on which it can arise.

It has enlarged the subject matter in that it has enabled estates tail of every known species to be created in every kind of personal property,[2] a thing hitherto impossible, with the express possibility of curtesy therein.

It has limited the occasions for curtesy, first, in allowing tenant in tail in possession to bar her estate tail by will.[3] Secondly, in abolishing curtesy of every description of estates held *in fee simple*[4] or fee (other than tail) by the wife of which she dies 'intestate'; to this latter enactment there is only one exception, the case of an adult wife, lunatic or defective on January 1, 1926, who dies intestate without recovering.[5]

But as there could before the new Acts be curtesy of the wife's fee, subject to an executory limitation or devise over to take effect at her death in a specified event happening; if that event happens, as she is clearly unable to devise such fee, she cannot be said to die as to such a fee, '*intestate*'; and curtesy will, I

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* Exhausiae of a lecture delivered to students of the University of London.

[1] L. P. Act, 1925, s. 209, sub-s. 3; Administration Act, 1925, s. 58, sub-s. 3.

[2] L. P. Act, 1925, s. 130, s. 205, sub-s. 1 (xx).

[3] L. P. Act, 1925, s. 176 (a mischievous section, likely to cause considerable litigation).

[4] A. E. Act, 1925, s. 45, sub-s. 1 (*b*), s. 52, s. 55, sub-s. 6.

[5] A. E. Act, 1925, s. 51, sub-s. 2. Though a wife can now by her will bar her estate tail, yet if she does not do so, the estate will descend, notwithstanding custom, as at common law: L. P. Act, s. 130, sub-ss. 4, 7; A. E. Act, 1925, s. 45, sub-s. 2, s. 51, sub-s. 4, s. 52.

apprehend, remain of that fee as before,[6] though the effect of the Acts is to turn that fee from a legal to an equitable fee.[7]

Nevertheless, paradoxical as it may seem, I believe that recent legislation will occasion questions of curtesy to be in future of much more frequent occurrence than in the past.

In the first place the recent unworthy and greedy grab[8] by the State of intestate successions, that, but for the new Acts, would descend to comparatively near relations, coupled with the fact that an infant cannot make a will,[9] will tend to the great increase of strict settlements by way of equitable entail, bringing in every relation in seniority and preventing *a fee simple* from vesting in an infant.

In the second place, the great increase of succession duty between collaterals will increase the tendency, which I have noticed already to exist, to leave estates tail created by lineal ancestors unbarred.[1]

Let us then shortly examine the principles[2] of curtesy, first at the common law, then as applied in equity to equitable estates settled or not settled to the wife's separate use, and last as to her property made at law her separate property by the Married Women's Property Acts.

And I will first essay to define curtesy *at the common law* as follows:

Definition.

'Tenancy by the law of England is the right, tacitly given by law, and by way of prolongation in him of his dead wife's interest therein to a husband[3] surviving his wife,[3] to remain during the rest of his life in possession of the tenements of inheritance in possession of his wife of which he in her right was at her death seised in deed as distinct from in law.

'Provided that (1) a child by her has been born to him alive, and (2) of the living body of its mother, and (3) such child had it lived long enough, could by any conceivable possibility

[6] A. E. Act, 1925, s. 45, sub-s. 1 (*b*), s. 52, s. 55, sub-s. 1 (vi).
[7] L. P. Act, 1925, ss. 1, 39, Schedule I, Part I.
[8] A. E. Act, 1925, s. 46.
[9] The provision in A. E. Act, 1925, s. 51, sub-s. 3, does not apply to the case of an infant who has married.
[1] The writer has recently come across several instances in which a lineal ancestor having settled, so that the estates come in succession in tail to several sisters, the elder sister has positively refused to bar her entail, preferring to be at the expense of having S. L. Act trustees appointed.
[2] Forgetfulness of which has often upset the supposed bar of an estate tail: Preston, Abstracts, iii, 385.
[3] Till the law was altered by statute (see note 3, p. 94, *post*), the husband and wife had both to be subjects, not aliens.

have succeeded as heir to its mother, as of the estate which she herself had in the tenement.

'*Qualification*: If no *legal* opportunity occurred during the coverture to get actual seisin, that is, seisin in deed, the husband was excused from not getting what he could not get.

'*Tenement* is used in its widest legal sense as including things savouring of the realty, and undivided shares, and rights of entry, but not till A.D. 1833 rights of action: but as excluding tenements held by the wife at her death in unsevered joint tenancy.'

I spoke advisedly of tenancy by the law of England, for, first, this was the most ancient designation of the right[4]; secondly, it in itself denotes curtesy at the common law, that is, by the general custom of the realm; and thirdly, Littleton tells us that the right was 'used in no other *realm* but in England only.'[5]

The right was, on the Conquest of Ireland, extended to Ireland, where it still holds.[6] But in Littleton's day Ireland was not a realm or kingdom; the King was Lord, not King, of Ireland.[7]

The right, with the qualification of ceasing on the husband's second marriage, existed also in Normandy, of which our King was Duke,[8] not King.

The right also exists in Scotland with this qualification[9]—that it extends only to heritages to which the wife has succeeded or is entitled to take up as heir of line, provision, or tailzie; it does not extend to property acquired by the wife by purchase or gift.

The custom of the locality in England might, of course, vary the right.

Thus the local customary curtesy in ancient socage land in Kent, *i.e.* gavelkind, gives the husband curtesy—

(*a*) Of a moiety only of his wife's tenement[1];

(*b*) For his widowerhood only[1]; but

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[4] Pollock & Maitland, ii, 415

[5] Litt. s. 35.

[6] See the writ 11 Hen. III, given Co. Litt. 30*a*, Hargrave's note (5); *Parks* v. *Hegan* [1903] 2 Ir. R. 643.

[7] Co. Litt. 7*a*, 7*b*.

[8] Appeals still lie from the Channel Islands to the King in Council as Duke of Normandy.

[9] Fraser, Husband and Wife, 1123.

[1] Robinson, Gavelkind (1st ed.), book ii, chap. i, and 5th ed. by Elton & Mackay; Y. B. 16 Edw. III, p. 220; Co. Litt. 30*a*; *Re Hobbs*, 36 Ch. D. 553.

(*c*) It does not require birth of a child of the marriage.[2]

But if the wife entitled to an entail in gavelkind land in Kent, though the estate be created before January 1, 1926, dies after that date, it will now be a question whether her husband does not take or fail of curtesy as at common law and no longer according to the custom.[3]

Where the local custom, which is the local law, varies the right from that given by the common law, the husband cannot, of course, disclaim the local curtesy to get common law curtesy.[4]

There was nothing to prevent proof of the custom of any other place, in which a custom can legally exist, varying the rights attached to curtesy of freeholds.[5]

But copyholds even of inheritance, though the tenant has a durable interest, are in the eye of the law but tenancies at will. It follows, then, that there could be no general curtesy of such: it must be affirmatively proved that the particular custom of the particular manor allows of curtesy; and if the particular custom allows of curtesy at all, it equally regulates and prescribes the *quantum* and conditions of its existence.[6]

In this lecture I do not speak of copyhold curtesy, and the new Acts have, of course, enfranchised copyholds.

Now what is the real reason for curtesy?

I would suggest that the true origin of curtesy is nothing but the common-sense view[7] that it is against the child's and

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[2] Robinson (1st ed.), p. 150 *et seq.*; (5th ed.) 136; Co. Litt. 30 *a*, 111*a*.

[3] L. P. Act, 1925, s. 130, sub-ss. 4, 7.

[4] Robinson (1st ed.), 181-183; *Davies* v. *Selby*, Cro. Eliz. 825; *Hunt* v. *Gilburne*, Cro. Eliz. 121 (cases on dower, but the principle is the same—if indeed husband could ever disclaim curtesy at law: Note A at end).

[5] There is an early unsuccessful plea that, by the custom of Colchester, issue need not be born; Bracton N. B. Case No. 779. Dower of freeholds might by local custom greatly vary the widow's right from that given by common law: Litt. s. 37. As to what places are capable of a separate custom, see Co. Litt. 110*b*, Hargrave's note.

[6] Litt. 337; *Rivet's Case*, 4 Coke, 22*a*; *Poulter* v. *Cornhill*, Cro. Eliz. 360; Watkins, Copyholds (4th ed.), ii, 73 *et seq.*; Elton, Copyholds (2nd ed.), 167, 168; Watkins, Descent, 59; Williams, Seisin, 5, 55, 56. Hence the special custom might unquestionably give the husband curtesy of the entire customary inheritance, as it may give the widow, though there be children, the like as dower or freebench: and the special custom may give curtesy of copyhold for lives. See article by the author on Customary Descents, 68 Sol. J. 807, 839, 864, 880.

[7] I make this suggestion with profound diffidence, seeing that that truly great writer Maitland has suggested (Pollock & Maitland, ii, p. 417, a suggestion echoed in *Parks* v. *Hegan* [1903] 2 Ir. R. 643) that the origin of the right was the desire of the surviving father to exclude the lord from wardship of his minor child. Had this been the reason we should expect to find first some trace of a time when though there was curtesy of land held in Knightservice, there was no curtesy of land held in socage, for of the latter the father, not the lord, held the wardship (Litt. ss. 103, 123, 125); secondly, some trace of the curtesy determining when the child was out of wardship, we find by the custom of Kent curtesy determining on the father's remarriage, as uncertain an event

the family's moral interest that the child shall be brought up to despise his father, the head of the family, as knowing that on its mother's death it can turn its father out. And I think that there are indications that this doctrine first arose in connexion with land settled on the wife at her marriage—a time when the interest of the whole prospective family is peculiarly considered—and that the doctrine was only afterwards applied to the wife's other acquisitions.

And in this connexion you should recollect that to this day there is no curtesy but of what the child could have seen its parents in actual enjoyment, had the child been born soon enough or lived long enough.[8] The only exception to this rule is the rare case when *legal* opportunity to get actual enjoyment does not occur during the marriage, as where the wife has an advowson in gross in possession; but the church does not fall vacant during the marriage, and so the wife never has legal opportunity to present to the living.

Glanville, our earliest text-book writer, wrote in the reign of Henry II; and he mentions curtesy, but only as arising in respect of land given *in maritagium*, that is, by our earliest form of marriage settlement.

In one passage[9] he tells us that a man may give a certain portion of his land *in maritagium* with his daughter or other woman, even against his heir's dissent. But the rest of that chapter shows what doubts then existed as to how much he could otherwise give away against his heir's dissent.

In the other passage[1] he says: 'When therefore any one has received lands with his wife *in maritagium* and has by her an heir male or female heard to cry within the four walls, then if the man survive his wife whether the heir live or not the *maritagium* shall notwithstanding remain to the husband during his life: but after his death'—and he must mean failure of heirs of the wife by the husband—'it shall revert to the original donor or his heirs. And if he never had an heir from

as that the child should attain twenty-one; and thirdly, we should not expect a custom giving curtesy, as that of Kent does, though no child is ever born.

[8] The fact that in general the husband had no curtesy, but of what the spouses or one of them had actually enjoyed at some time during the coverture, far from militating against, does, I think, support my theory. For if the husband never took the trouble to obtain, or did not in fact obtain actual seisin during the coverture, the child did not deprive the father of anything that the father had enjoyed. Williams, R. P. (16th ed.), App. D, has shown conclusively that the reason for actual seisin being required to give the husband curtesy of land in fee simple descended on the wife, was not due to the necessity under the old law of the person claiming to be her heir to show that she was actually seised.

[9] Glanville by Beames, 138.

[1] P. 193, 194.

his wife, then immediately after her death the *maritagium* shall revert to the donor or his heirs.'

Here, therefore, Glanville speaks of curtesy only in connexion with land given on marriage settlement, that is, *in maritagium*; and it is his *only* passage dealing with curtesy.

The earliest reported cases which I have been able to find occur between A.D. 1199 and 1202, early in King John's reign, and are both concerned with curtesy of land given *in maritagium*.[2]

In the latter the wife's father, De Boythorpe, tries to recover land given by him *in maritagium* on his late daughter's marriage to John de Cordel, the defendant. The sole question is whether the only child of the marriage, admittedly a six-months' child, was or was not born alive. The parties compromise.

Perhaps, too, we find some trace of this distinction in A.D. 1233 in *Wyot Marshall's Case*, who pleads that by the special custom of Colchester a husband who has had no child by his wife may have curtesy both of his wife's lands taken *in maritagium* and also of those taken by descent.[3]

I think it not unprofitable, when the new legislation allows curtesy of entailed personalty, to try to discover the real original reason for the establishment of curtesy.

But comparatively early in the reign of Henry III we find it completely established that there shall be curtesy also of the wife's estates taken *by inheritance*[4]; and allowing for the fact that entails were then unknown—what we should now call

[2] *William* v. *Herbert*, 2 John Pl. Abbreviata, p. 30, Salop; *De Boythorpe* v *John de Cordel*, Seld. Soc. Sel. Civil Pleas, i, p. 75. It thus clearly appears that in Glanville's time and for some time after, the limitation *in maritagium* was in effect to the wife *alone and the heirs of her body by the particular husband*, the sort of limitation that after the Statute de Donis made the sort of special entail mentioned, substituting wife for man, in Litt. ss. 29, 33: had the limitation in frank marriage, as frank marriage was understood in Littleton's time, ss. 16, 17, been to the two and the heirs between them begotten, then the husband would have had a direct estate to himself, and curtesy as such would not have been possible. See Litt. s. 283, and s. 32.

[3] *Wyott Marshall's Case*, Bracton N. B. No. 779, A.D. 1233. The wife's lands taken *in maritagium* and by descent are both specifically mentioned in early statutes: Magna Carta 9 Hen. III, c. 7; Coke, 2nd Instit. 16; and see Littleton's references to the Statute of Gloucester, Litt. ss. 728, 732.

[4] A.D. 1227, *William of the Marshes Case*, Bracton N. B. Case No. 266; A.D. 1229, *Richard of Drereborough's Case*, *ibid.* No. 319, a case of an advowson it seems in gross descended on the wife; A.D. 1224, *Hugh of Rikinghall's Case*, *ibid.* No. 917; A.D. 1236, *William Warison's Case*, *ibid.* No. 1182, reported also FitzH. Abr. Dower, 198, in which the second husband gets curtesy with the King, the lord's, full consent, against the surviving child of the first marriage, of his wife's lands in fee simple, which descended on her only after all her children by her second husband had died. This most important decision shows with perhaps other authorities (see A.D. 1225, *Nicholas of Kenet's Case*, Bract. N. B. Case 1071, reported also FitzH. Abr. Dower, 202) that the King as much as any other lord is bound by curtesy; the homage of the wife's heir is postponed till the second husband's death.

an estate tail being then a conditional fee—the law, as it now stands, seems to have been even then completely settled.

The true key to the mysteries of curtesy at common law lay in this—that though the husband surviving his wife had a life estate, it was no new thing arising first at her death, but was a life estate merely by the reduction at her death to a life estate in him of the inheritance or fee in her tenement, which already before her death and during the coverture was in him, but in her right.

This inheritance already in him, but in her right, was by fiction of, and as tacit gift of, the law, prolonged in him for the rest of his life as an annex to, or emanation of, her estate in the tenement.[5]

He did not *come in* at her death; he *remained in*, and as direct tenant to the lord. He was not in through the wife or the wife's heir.[6]

We are not to look on the law as creating on her death an immediate descent, by way of settlement, as it were, on the husband for life, with *remainder* to the wife's heir. No, the descent was altogether postponed till the death of the surviving husband, till when the wife's heir had but a *reversion*, and till when the homage of the wife's heir to the lord is postponed.[7]

Let us try to explain this. The wife could not be sole seised of her tenements according to the principles of our common law, for husband and wife are one person. Yet during the coverture the fee or inheritance of her tenement must be somewhere. Therefore, till she had by her husband issue inheritable, the fee was vested in both husband and wife, but in her right. This is proved by the fact that till birth of inheritable issue, where homage was exigible, both husband and wife did homage to the lord, for none but owner of an estate of *inheritance* in his own or another's right could either do or receive homage.

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[5] *Paine's Case*, 8 Coke, p. 36*a*; *Caran* v. *Pulteney*, 2 Ves. p. 560, 3 Ves. p. 286; *Parker* v. *Carter*, 4 Hare, 400.

[6] FitzH. N. B. 258; Coke, 2nd Inst. 300; Brooke, Tenant by the Curtesy, pl. 13, 14; Y. B. 11 & 12 Edw. II, p. 347; Doct. & Stud. Dial. ii, chap. iv. 'For immediately after the death of the wife the possession abideth still in him by act of the law without entry': Watkins, Descent, 86-89.

[7] Litt. ss. 388, 393, 394; Co. Litt. 241*b*; Bracton N. B. Case No. 1182; Watkins, Descent, 72-89. In this respect dower differed from curtesy, on the husband's death the descent is immediate to his heir; and till assignment by metes and bounds in satisfaction of her dower the widow has no estate: *Williams* v. *Thomas* [1909] 1 Ch. 713. But when such assignment is once made, the widow is, by a fiction of relation back, deemed to be in of her husband as a continuation of his estate, though she is attendant on her husband's heir; but tenant by curtesy was in of his wife's estate direct without any fiction of relation back, his estate 'taking effect in reality, as dower does by relation, before any interest be vested in the heir'; Watkins, Descent, 86; Park on Dower, p. 343; *Moody* v. *King*, 2 Bing. p. 453.

But it seems that, after the birth of issue of the marriage, the husband alone during the coverture did homage, but in his wife's right, thus proving that the inheritance was thenceforth during the rest of the coverture in him solely.[8]

The reason of this change on the birth of issue to the sole seisin of the husband seems to have been that at the same moment he acquired a *title* to hold in, should he survive his wife for the rest of his life.[9]

Estate for life it could not yet be till the death of the wife; for during the coverture the fee must be somewhere, and, indeed, was already in him and his wife before birth of issue. But to mark the acquisition of his *title* to curtesy, the law, it seems, changed the inheritance from being in both husband and wife in her right into being in him solely, but in her right, during the rest of the coverture.

Then when the wife died leaving the husband surviving, for as much as the law allowed his title now to hold only for his life and no longer, the law had to cut down the *estate* in fee previously vested in him during the coverture to an estate commensurate with the *title* it had previously given him. The result could only be a life estate in him. What remained for the wife's heir was nothing but a reversion on his life estate.[1]

Thus the wife's death consummated the *title* [2] in the husband which the husband already previously held, into an *estate* for his life, not by new creation of a new life estate as such, but as reduction of his previous estate of inheritance in her right, to such life estate in his own.[3]

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[8] Litt. ss. 87, 88, 90, and ss. 728-731; Coke, 2nd Inst. 145; Co. Litt. 66*a*, 67*a*; Gilbert, Tenures (ed. 1759), 108, 109.

[9] Litt. ss. 35, 52, 88, 90, 264; Co. Litt. 66*a*, 67*a*; Perkins, s. 685; Keilway, pl. 4, p. 2; Roper, Husband and Wife, (2nd ed.), p. 3; Bacon, Abr. Curtesy, 560. Even if the wife concealing that she was married had levied a fine in Court, a judicial act, her husband could avoid it during her life, or if tenant by the curtesy then after her death, so far as regarded his own interest: Shep. T. 7.

[1] Where homage was exigible the heir's homage was postponed till the death of tenant by the curtesy (*William Warrinson's Case*, Bracton N. B. Case No. 1182), and, of course, till then the infant heir was not in ward to the lord: FitzH. N. B. 143 L. It will be seen that the text suggests that on birth of issue the seisin of husband and wife in the wife's right was turned to the sole seisin of husband in her right, support for which position is certainly found in Co. Litt. 66*a*, 67*b*, and probably in Litt. ss. 88, 90; but even if this change did not occur then certainly the fee remained in both during the coverture.

[2] As to the inchoacy of husband's curtesy during the coverture, see Note A at end.

[3] An English husband could not apparently at common law have curtesy of his alien wife's land, for the law refused to give him any legal seisin of his wife's land: *Burk* v. *Brown*, 2 Atk. 398; cp. *Theobalds* v. *Duffery*, 9 Mod. at p. 104; *Dumoncel*, 13 Ir. Eq. R. 96. The reason was apparently that at law, notwithstanding her marriage, she remained a foreigner, an alien, that the

If indeed on the wife's death her inheritance as in possession did *immediately* though but for a second, descend on the wife's heir, then the husband lost his curtesy: all fiction that the wife's estate was prolonged in the husband was impossible.

Thus to this day it is requisite to curtesy, that not only a child of the marriage be born alive, but that it be born also of the living body, and not ripped from the dead body of its mother.[4]

For in the latter case the wife's tenement has, for the second perhaps intervening between the mother's death and the birth of her child her true but posthumous heir, descended on her heir collateral (or if the mother's estate be an estate tail, gone over to the remainderman or reversioner on the mother's estate tail): and though it will divest back into the mother's child on its birth the second later,[5] still on the mother's death the tenement as in possession has immediately descended from her.

It is indeed only on this fiction of prolongation of the wife's estate in the husband, that the law has been able (as it has always been able) to allow the husband to remain in, notwithstanding that every child and issue of the marriage has predeceased the wife, not only against the wife's heir collateral, but also against the expressed or implied words of the donor, that on the death of the wife and the failure of issue of the marriage, the tenement shall revert to him or his heirs [6]; and after estates tail had been constituted by the Statute de Donis, to allow the husband to remain in for his life against the remainderman or reversioner on his wife's estate tail [7]; and after the Statutes of Uses and of Devises of the reign of Henry VIII. had rendered valid an executory limitation or devise over, on the wife's fee, to allow the husband to remain in for his life against the donee under the executory limitation or devise over.[8]

In fact, so long as a child is born alive during the coverture, the point of time when the child is born or dies is utterly immaterial to the husband's rights in his curtesy.

Crown on Inquisition could take her land, and that the law will do nothing in vain; Cockburn, Nationality, 24, 25; *Sharp* v. *St. Sauveur*, 7 Ch. 353; *Dumoncel*, 13 Ir. Eq. R. 96. The law was accordingly altered by statute: 7 & 8 Vict. c. 66, s. 16; Naturalization Act, 1870, ss. 2, 10, sub-s. 1; 1872, s. 3; Nationality Act, 1914.

[4] *Repp's Case*, cited 8 Coke, 35*a*; Co. Litt. 296; *Marsellis* v. *Thalimer*, 2 Paige (American), 35; Bacon, Abr. Curtesy, 560.

[5] Watkins, Descent, chap. iv, 169, 177, 179.

[6] Glanville by Beames, 193, 194; *De Beythorpe* v. *Cordal*, Seld. Soc. Sel. Civil Pleas, i, p. 75; *Parks* v. *Hegan* [1903] 2 Ir. R. 643.

[7] Litt. ss. 35, 52; *Paine's Case*, 8 Coke, 34*a*; Brooke, Dower, pl. 86.

[8] *Backworth* v. *Thirkell*, 4 Douglas, 323; 3 B. & P. 652*n*.

To this rule there were one or two exceptions no longer of any practical importance, with which I shall not now detain the reader.[9]

In further proof of the rule: it is utterly immaterial not only that the only child predeceases its mother, but that it also predeceases her very acquisition of the tenement out of which curtesy is claimed.[1] This was settled in A.D. 1236. In that case *Agnes de Wahull*, tenant in chief of the King, had died, and *John of Basinghall*, her son by her first husband, was found to be her heir and wanted to do homage for her land to the King: her second husband William son of Warin had had by her three children, who had not only predeceased their mother, but had also predeceased their mother's acquisition by descent of part of the land in question, and William claimed curtesy. *John* says that *William* cannot have curtesy at all events as to the part descended on Agnes after the death of all his children by Agnes. But 'Our Lord the King does not wish to change the custom of England for many years past used, and therefore let *William* go quit with his seisin. And the homage of *John* is postponed until he shall have seisin'—on the death of William.

So again it is utterly immaterial to the husband's claim that the spouses, having once been in actual possession during the marriage, were disseised long before any child was born, and remained disseised for the rest of the wife's life[2]: this statement must of course be taken subject to this, that the wife's title has not been extinguished under the Statute of Limitations.

Two more illustrations of the fiction that curtesy is but a prolongation of and part of the wife's estate:—

Suppose Eliza Smith wife of John Smith[3] is seised in tail of Blackacre, and her father wishing to induce her to settle Blackacre as he likes, purports to devise Blackacre to her for life only, with remainder over, and gives Eliza Smith and John Smith separate large outside benefits out of his own proper estate: now suppose Eliza Smith insists on retaining her entail in Blackacre, making compensation to the disappointed remaindermen under her father's will, out of the separate outside benefit given to her by her father's will: then suppose her

[9] See Note A at end on Inchoacy of Curtesy, which exceptions, however, go far to prove that on birth of issue the husband became *sole* seised in his wife's right of the inheritance.

[1] Bracton, Note-Book, Case No. 1182; reported also FitzHerbert, Abr. Dower, 202; Perkins, s. 473; Co. Litt. 29*b*; *Paine's Case*, 8 Coke, 35*a*. The query on this point in Brooke, Tenant by the Curtesy, pl. 13, is unsustainable.

[2] Perkins, ss. 472, 475; Co. Litt. 30*a*; cp. *Parks* v. *Hegan* [1903] 2 Ir. R. 643.

[3] *Lord Cavan* v. *Pulteney*, 2 Ves. 544; 3 Ves. 384.

to die. Now John Smith may claim his curtesy in Blackacre without making compensation therefor out of the outside benefits given to him, John Smith, by his father-in-law's will. Why? because his curtesy is but part of his wife's estate tail, and for that she has already made compensation.

So again suppose A seised of land in fee creates *de novo* by way of grant a rentcharge to the wife merely in tail, without limiting any remainder over of the rentcharge, the wife's husband, though all issue of her marriage predecease the wife, will, it is conceived, be curtesiable[4]: whereas had the wife barred her entail in such rentcharge, she could have conveyed only a base fee terminable at her death in the above circumstances.[5]

And now let us glance for an instant at the kinds of property in which the husband could formerly and can now have curtesy.

Curtesy until the recent Acts could only issue out of a tenement,[6] using that expression in its wide sense as including not only land which could be a proper subject of tenure but also anything savouring of the realty.

Thus there might and may be curtesy of rentcharges,[7] advowsons in gross,[8] villeins in gross, common *sans nombre*, a fair, seignory, bailiwick or suchlike.[9]

In fact curtesy could arise in things out of which a wife was dowable, and of more, for of some things which could not be divided, as of common *sans nombre*, the wife was not dowable at common law.[1]

You will find a list of things dowable in Park on Dower.[2]

Curtesy, too, can be of undivided shares held in coparcenary,[3] or in tenancy in common,[4] or in separate turns of presentation to an advowson in gross which coparceners have partitioned, as to present in turn[5]; or of a severalty taken on partition.[5]

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[4] Co. Litt. 30*a*; Hale's note (*a*); Bacon, Abr. Curtesy, 553; consider *Chaplin* v. *C*, 1 P. Wms. at p. 229.

[5] Farrer, Conditions, 214. And the encumbrance of feme tenant in tail created by her while sole would, though his issue predeceased him, bind her surviving husband, tenant by the curtesy: Dyer 51*b*, note 17.

[6] Litt. ss. 35, 52.

[7] Perkins, ss. 460, 461, 469; *Dettrick* v. *Bradburn*, 2 Sid. 117; Co. Litt. 30*a*.

[8] *Richard of Dereborough's Case*, Bract. N. B. No. 319; *The King* v. *Ros*, 3 Edw. II, Y. B. Seld. Soc. ii, 135, 136; Perkins, s. 468.

[9] Perkins, ss. 459, 462, 341, 343; Co. Litt. 30*b*.

[1] Perkins, s. 341; Bacon, Abr. Curtesy, 552.

[2] Park, Dower, 111.

[3] Litt. s. 264; *Ralph* v. *John*, 4 Edw. II, Y. B. Seld. Soc. 175; Co. Litt. 166*b*, 175*b*.

[4] *Re Hobbs*, 36 Ch. D. 553; *Sterling* v. *Penlington*, 9 Mod. 248; *Watts* v. *Ball*, 1 P. Wms. 108.

[5] Brooke, Tenant by Curtesy, pl. 2; Statham, Entré Congeable (15); Brooke, Entré Congeable (31).

Curtesy of a peerage is now obsolete; the husband can no longer sit in the House of Lords as of his wife's dignity.[6]

Where, however, the wife is tenant with others in unsevered joint tenancy at her death,[7] the *ius accresendi* of her fellows precedes and defeats her husband's claim.

There are certain personal inheritances which are hereditaments but not 'tenements,' and not being 'tenements' were not entailable under the Statute de Donis, and were not susceptible of curtesy.[8] Such are personal annuities to a woman and her heirs or the heirs of her body.[9]

Now, however, under the Law of Property Act, 1925, s. 130, all personal estate may be entailed, and a man may have curtesy of such an annuity entailed, and even of his wife's petticoat. There was always curtesy of a right of entry, but not till 1833 of a right of action.

Where the spouses, having been in possession during the marriage, were evicted, then so long as the husband could restore his dead wife's estate in the land by mere entry on the disseisor, and did so, he always had his curtesy.[1]

But when the wife's estate had been turned as it was called to a right, that is to say, could no longer be restored by mere entry, but could be recovered only by action at law, the husband till the law was altered in 1833 had no curtesy.[2]

This requires a word of explanation: when one had disseised the spouses, they might always, during the disseisor's own life, restore the wife's old estate by mere entry on the disseisor; but when the disseisor died, and the law cast his wrongful estate on his heir, it required another act of law, *i.e.*, action and execution, for the husband to undo what the law itself had once done. The descent cast was said to toll or take away the entry, and turn it to a right of action.[3]

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[6] Allowed in *Wymbish's Case*, Cruise, Dignities, 106, but later disallowed (p. 107 *et seq.*).

[7] Co. Litt. 183 *a*; 2 Rolle Abr. p. 90; *Cowley & Anderson*, Tothill, 83; *Palmer* v. *Riche* [1897] 1 Ch. 134.

[8] As to when rentcharge might elect for a personal annuity in lieu of rentcharge, and its consequences, see article by the author in Law Journal, vol. 60, pp. 676, 701, 720.

[9] I do not know any direct authority to the point on curtesy, but it was well established that there could not be dower of such an annuity (Perkins, ss. 347, 373; Co. Litt. 32*a*; Park, Dower, 111), which authorities are in point for curtesy. Of course, the paramount power of the Legislature could entail such an annuity. As to the subject of personal hereditaments, see *Att.-Gen.* v. *Richmond* [1907] 2 K. B. 940; Challis (2nd ed.), 46, 47; Gilbert, Rents, p. 128.

[1] Perkins, ss. 457, 458, 472.

[2] Litt. ss. 403, 404; Perkins, s. 457; Co. Litt. 29*a*; Watkins, Descent, 44, 45.

[3] Litt. ss. 385-413. After Littleton's day for this effect the disseisor had by statute of Henry VIII to be in possession for five years before the descent cast.

However, since 1833,[4] it is enacted 'that no descent cast shall toll or defeat any right of entry.' Hence since 1833 a husband might have had curtesy, where before that Act he failed of curtesy.

Equally of course there may, unless and until the rightful owner recovers the tenement, be curtesy of the wrongful estate (which is ever a fee)[5] taken in the tenement by the disseisor; as if a woman while sole or after her marriage disseise the rightful owner, marry, have issue by her husband and predecease him.

Now a few words as to the birth of the child.

To found the husband's claim it is requisite that a child of *his* marriage with the wife be born alive,[6] a stillborn child is no child. We have seen, too, that the child has to be born of the living body of its mother.[7]

It has never been enough that the wife has a child by a former husband[8]; accordingly we find in the reign of Henry III childless second husbands, the one vainly pleading that by the custom of Colchester, so long as the wife has had a child by her first husband, birth of a child to the claimant second husband is not necessary[9]; the other, that if the King grant in frank marriage on the first marriage, and there be issue of that first marriage, he the second husband need not have issue by his wife.[1]

The child, of course, must be legitimate by the law of the land, and not only in the eye of Holy Church; thus if the only child of the parents is born before their subsequent marriage, the father could neither before nor since the Statute of Merton have curtesy[2]; for the child could not inherit as heir to its mother.

But if the marriage were voidable only, and not void, and were not avoided in the joint lives of the spouses, the marriage could not afterwards be avoided.[3]

If indeed it ever were necessary that to prove live birth, the

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[4] 3 & 4 Will. IV, c. 27, s. 39; and see Carson, R. P. S. notes to this section.

[5] Litt. s. 394; Co. Litt. 241*b*; Watkins, Descent, p. 4, note (*c*); Williams, Seisin, 8; Perkins, s. 46. Where the wife was bastard eigné, *i.e.* born before the marriage of her parents, and she held as heir for the whole of her life to the exclusion of her younger legitimate sister, her husband had curtesy: Statham, Entré Congeable (15); Brooke, Entré Congeable (31). On the whole doctrine of the Bastard Eigné and Mulier Puisne and whether it still exists, see articles by the author: L. Q. R. vol. 33, p. 35; vol. 34, p. 27.

[6] Litt. s. 35; Perkins, s. 471; Co. Litt. 29*b*.

[7] *Ante*, p. 9.

[8] Glanville, 193, 194; Litt. ss. 35, 52.

[9] Bracton, Note-Book, Case No. 779.

[1] *Nicholas of Kenet's Case*, Bracton N. B. Case No. 1071.

[2] Statute of Merton, A.D. 1235, c. 9; Coke, 2nd Inst. p. 95; *Robert of Norfolk's Case*, Bracton N. B. Case No. 291.

[3] *Hinks* v. *Harris*, Carthew, 271.

child must be heard to cry, such a condition has for centuries been obsolete[4]; all that is requisite is that the child be proved to have been born alive, and one vital act, such as pulsation in the child's portion of the umbilical cord after severance, seems quite sufficient.[5]

The child must by conceivable possibility be capable of inheriting the tenement of such estate therein as its mother has, as heir to its mother.[6]

It follows, therefore, that there can be no curtesy of an estate *pur autre vie*, for if the child takes its mother's estate of this nature, it does not take by descent, but as quasi purchaser, as special occupant, named in the grant.[7]

For this reason, that copyholds though of customary inheritance are in the eye of the law but tenancies at will, there is no general curtesy of copyholds; in each particular case the custom of the manor governs as to whether there shall be curtesy or not, and if it gives curtesy at all, prescribes its ambit.[8]

But of all tenements which the wife held for a true estate of inheritance in possession, there might be curtesy; we are, however, to recollect that in assurances since January 1, 1926, the great rule known as the rule in *Shelley's Case* is abrogated; so the wife will often now have no inheritance where before these Acts she would be held to have inheritance.[9]

Thus (subject to the alterations by the 1925 legislation) there may be curtesy of fee simple,[1] fee conditional at common law before the Statute de Donis turned the same to a fee tail,[2] fee defeasible on breach of condition and entry for breach, estate tail[3]; and in certain cases of fee, subject to executory limitation or devise over, which is limited to take effect at the wife's death, and does then take effect.

This last demands particular attention.

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[4] Litt. s. 35; Perkins, s. 471; Co. Litt. 29*b*.

[5] *Brock* v. *Kellogg*, 30 L. J. Ch. 498. Of course, the conduct of the wife's collateral heir having opportunity of knowing the fact is very relevant to the inquiry: *Jones* v. *Ricketts*, 31 L. J. Ch. 753. As to live birth, see an article by Mr. Atkinson, L. Q. R. vol. 20, p. 134.

[6] Litt. s. 52.

[7] *Hearle* v. *Greenbank*, 3 Atk. 708; *Stead* v. *Platt*, 18 Beav. 50; Perkins, s. 467; Co. Litt. 30*a*.

[8] *Ante*, p. 90.

[9] Law of Property Act, 1925, s. 131.

[1] Litt. ss. 35, 52. See *ante*, p. 92, that this was clear quite early in the reign of Henry III.

[2] See the gifts in *maritagium* referred to Glanville, 193, 194; *De Boythorpe* v. *Cordal*, Seld. Soc. Sel. Civil Pleas, i, p. 75, A.D. 1200-1202.

[3] Litt. s. 35; *Paine's Case*, 8 Coke, 34*a*; *Cooper* v. *Macdonald*, 7 Ch. D. 288; Brooke, Dower, pl. 86; Dyer, 51*b*, note 17; and many other authorities.

A testator devised land [5] in effect to Mary Barr and her heirs but if she died under the age of twenty-one years and without leaving issue at her death, then to W. B. for life with remainders over.

Mary married as an infant, had a single child who predeceased her, and afterwards Mary died still under age. Lord Mansfield and the K. B. held that her husband had curtesy.

This case, which gave rise at the time to considerable objection (which objection was not, I think, founded on true principle), has been followed in the cognate case of Dower in the King's Bench and in the Common Pleas,[6] and is now unquestionable law.

But we must here point out that if the event on which the wife's fee is to go over actually happens, and so happening, *all* the children born to the wife by the husband *must necessarily take as purchasers under the very gift over;* then it has been held, that as in the actual event that happens no child born of the marriage by any conceivable possibility could take by descent the fee of the wife, that the husband will not have curtesy.

As, for instance, suppose a testator devises to Mary Smith in fee, but if she predeceases her husband, then to all her children, *and no child of Mary dies in the testator's life*, and Mary has children, and predeceases her husband.[7]

But had Mary had a child who predeceased the testator, then, I conceive, the husband would take curtesy; for the predeceasing child could not possibly take by purchase under the gift over; and yet by conceivable possibility that child might have inherited the fee in Mary, and so founded her husband's curtesy.[8]

So again the same principle should apply had the gift ever been only to all Mary's *sons*, and besides sons she had had a *daughter*.

I have been a little particular in calling your attention to the fact that there may be curtesy of the wife's fee subject to an executory limitation over, when that limitation over is to take effect, if at all, and does take effect upon her death; for first, I believe the point is often overlooked, and secondly, notwith-

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[5] *Backworth* v. *Thirkell*, 3 B. & P. 652; 4 Douglas, 323.

[6] *Goodenough* v. *Goodenough*, 3 Prest. Abstracts, 372; *Moody* v. *King*, 2 Bing. 447.

[7] *Sumner* v. *Partridge*, 3 Atk. 46; *Barker* v. *Barker*, 2 Sim. 249. I think we must assume that in the first above-cited case no child of the wife predeceased the testator; and see comment on *Boothby* v. *Vernon*, cited Note B at end.

[8] We have seen *ante*, p. 96, that it is utterly immaterial that the child predeceases the acquisition by its mother of the estate.

standing the new Acts,[9] curtesy of such defeated fee of the wife will, it seems, clearly remain; for it is obvious that she cannot possibly devise such fee, and therefore cannot be said to die 'intestate' as to such fee, any more than I myself could be said to die 'intestate' as to Buckingham Palace. And the husband's rights, legal or equitable, are not to be taken away except on clear words.

As the child has to be by possibility capable of inheriting the tenement of such an estate as its mother had,[1] it follows that if a tenement be given to the wife in tail male and she has only a daughter, that the husband cannot have curtesy.[2]

It follows equally that if land be given on a first marriage to husband and wife and the heirs of their *two* bodies, whether or not there is issue born of this marriage, that the second husband, though there be issue of the second marriage, cannot have curtesy.[3]

But we should point out that in the last instance, the wife after the first husband's death, and after failure of inheritable issue of her first marriage, will be tenant in tail after possibility of issue extinct[4]; and that such a tenancy in tail after possibility, etc., can merge either in a real tenancy in tail, or in a fee simple in the wife. Thus suppose on a first marriage tenements are given to the first husband and wife and the heirs of their two bodies, with a remainder in tail, or in fee to the wife; or suppose the reversion in fee comes to the wife: the first husband dying, then after failure of issue of the first marriage before or during the second marriage, the second husband, if he has a child by his wife, will be curtesiable of the larger estate in which his wife's tenancy in tail after possibility, etc., has merged.[5]

The last condition for curtesy was that the husband must get actual seisin[6] or enjoyment in his wife's right during the coverture, and retain it, or its equivalent, at the wife's death.

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[9] Administration of Estates Act, 1925, s. 45, sub-s. 1 (*b*). It should be remembered that if a fee is given to a wife, with executory limitation over on default or failure of her issue, her fee is statutorily enlarged to a fee simple whenever any issue of the class mentioned attains twenty-one (L. P. Act, 1925, s. 134; C. Act, 1882, s. 10; *Re Booth* [1900] 1 Ch. 768; *Re Shrubb* [1910] W. N. 143), and of a fee simple her husband no longer has curtesy: A. E. Act, 1925, s. 45, sub-s. 1 (*b*).

[1] Litt. s. 52.

[2] Litt. ss. 21, 24.

[3] Litt. ss. 16, 17.

[4] Litt. ss. 32-34.

[5] *Lewis Bowles' Case*, 11 Coke, 80*b*; Brooke, Abr Estates, 25; Tenant by the Curtesy, 4; Prest. Conv. iii, p. 224; Prest. Abstr. iii, 383, 384; Watkins, Descent, 124-126; FitzH. Abr. Barre, 99.

[6] A question has been tentatively suggested in a recent case (*Parks* v. *Hegan*

You will sometimes hear it said that a moment's actual seisin during the coverture is sufficient, and this is undoubtedly true, and always has been true, within limits, as against a disseisor of, or adverse possessor of, the wife's estate.

Thus suppose a woman while sole, or a widow, to be disseised, and the disseisin to continue throughout the whole of her subsequent coverture, her husband could not and cannot have curtesy.[7]

But suppose the husband, or the wife even though unknown to her husband, had during the coverture entered but for a moment upon the disseisor, been again evicted, and the wife had died disseised, the husband, so long as his right to restore his wife's estate by his mere entry subsisted, was entitled so to enter, and entering to have his curtesy.[8]

But suppose by descent from the disseisor, the husband's entry had been tolled, and an action at law was requisite to restore his wife's old estate, he lost his curtesy till the law was altered by statute,[9] as we have seen.

So you see that it was not universally true even against a disseisor, that momentary actual seisin during the coverture was sufficient. And you also see that in our law a right of entry was regarded as an actual estate.[1]

This requirement for actual seisin during the coverture at once, of course, ruled out from curtesy all remainders and reversions of the wife expectant upon an estate of freehold—that is to say, expectant on an estate for life, or *pur autre vie*, or in tail[2]—outstanding at the wife's death.

For the actual legal seisin is in the owner of the first estate of freehold.[3]

Thus if a daughter, heir of her deceased father, assigned land to her widowed mother by way of dower, married, had issue by her husband, and died in her mother's life, of the reversion in the land so assigned her husband could not have curtesy.[4]

[1903] 2 Ir. R. 643), whether if the wife takes an estate during the marriage by conveyance operating under the Statute of Uses, the statute vesting the estate in her without entry, does not preclude the necessity of her getting actual seisin to found her husband's curtesy. The writer can find no other trace of such a suggestion, which seems to have no foundation. See Gilbert, Uses (by Sugden), 48, note 5, p. 228, note; Bacon, Uses, Rowe's note, p. 146.

[7] Perkins, ss. 457, 458; *Carter* v. *Task*, 1 Salk. 241; Litt. ss. 403, 404.

[8] Perkins, ss. 458, 472; *Sterling* v. *Penlington*, 9 Mod. p. 249; *Parker* v. *Carter*, 4 Hare, p. 414.

[9] Explained above, p. 98.

[1] It was sufficient to support a contingent remainder: Fearne, 286. A right of entry supposes an estate: *Dormer* v. *Packhurst*, 3 Atk. 140.

[2] Litt. ss. 380, 381.

[3] Watkins, Descent, 35, 57-59, 114; Williams, Seisin, 67, 169.

[4] Brooke, Tenant by the Curtesy, pl. 10.

And as a lessee for life or lives though at a rent has a freehold estate, if a woman while sole granted a lease for life or lives at a rent, and married, and the lease was outstanding at her death, her husband could not have curtesy of the land,[5] because there was only a reversion in the land and the spouses had no actual seisin of that, nor of the rent, because the rent was only *pur autre vie*, and consequently not inheritable to by the wife's child.[6]

So if a man devised land to his daughter A for life, remainder to B for life, remainder to his daughter A in fee, and his daughter died in B's life, A's husband could not have curtesy; for what A had at her death in actual possession was only a life estate, a thing not curtesiable; and as to the inheritance, she had it only in remainder after the life estate of B, and of such remainder she is not actually possessed.[7]

But had, in the case we have last supposed, B's remainder been for a term of years instead of for life, then A's husband would have had curtesy, subject to B's term.[8]

The reason is, that in this case A would be considered to have the fee simple in possession by the union of her freehold estate for life with her inheritance in remainder; it is true that at her death B would come in for his term of years, but the possession of a termor for years is considered in law to be the actual possession of the freeholder subject to the term[9]; hence as A had both in actual possession a life estate and a remainder in fee on that life estate, subject only to a term, she could be said to be actually seised in fee in possession.

On this very principle, viz., the possession of a termor for years being the actual seisin of the freeholder subject to the term, suppose a father to die intestate of land in the occupation of his tenant for years or less, leaving his daughter his heiress, she will be, through the possession of the tenants, in actual possession the instant the breath leaves her father's body, and her husband will be curtesiable.[1]

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[5] Perkins, s. 467; Co. Litt. 32*a*.

[6] Perkins, s. 467; Co. Litt. 30*a*; *Hearle* v. *Greenbank*, 3 Atk. 708; *Stead* v. *Platt*, 18 Beav. 50. Other instances of there being no curtesy of a remainder or reversion expectant on a freehold will be found in *Boothby* v. *Vernon*, 9 Mod. 147 (as to this case, see Note B at end): Litt. ss. 283; 284; Co. Litt. 183*a*; *Doe d. Neville* v. *Rivers*, 7 T. R. 276; *Gibbens* v. *Eyden*, 7 Eq. 371; 2 Rolle Abr. 90.

[7] Litt. ss. 283, 284; Co. Litt. 183*a*; 2 Rolle Abr. 90; *Daniel* v. *Uply*, Latch, p. 44; *Cordal's Case*, Cro. Eliz. 316.

[8] *Bates' Case*, 1 Salk. 254; Preston, Abstracts, iii, 382; Preston, Conv. iii, 108, 115.

[9] Watkins, Descent, 34, 56-59, 114; Williams, Seisin, 5, 35, 55; Preston, Conveyancing, iii, 108, 109.

[1] *De Grey* v. *Richardson*, 3 Atk. p. 472. Watkins, Descent, pp. 56-59.

And it will be quite immaterial that the tenants have not paid to her any rent that became due before her death, so long as they have not paid all rent that became due to her during her marriage to an adverse claimant.[2]

So on this principle suppose there is a trust term to pay debts, and subject thereto the wife has the inheritance, and the trustees are in actual possession under the term, and the wife dies, her husband will be curtesiable subject to the term.[3]

And I conceive that on the same principle if trustees were in possession under the usual term to raise jointures or portions preceding the estate of the wife, their actual possession would be sufficiently hers to give her husband curtesy, subject to the jointure and portions.[4]

As regards the wife's inheritance in possession in law, where *legal* opportunity for getting actual seisin in fact occurred during the coverture, the fact that the wife died before it was physically possible for the spouses themselves by any exertion to get actual seisin, was never, and is not, an excuse to the husband.[5]

This is clearly stated both by *Perkins*, and *St. Jermyn*, the author of 'The Doctor and Student,' who both wrote early in Henry VIII's reign.

Perkins gives as his illustration of the difficulties of travel in his day the following case of the husband's inability to get actual seisin, being no excuse:

The father of the wife dies seised of land in his own actual occupation in Yorkshire, leaving his heir his daughter married to and living with her husband in Essex, and the daughter dies the day following her father's death.

But I should here say that had a friend, though unknown to the spouses, entered to the use of the daughter before her death,

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Perkins, s. 470, clearly indicates that there the father himself was in actual occupation.

[2] *De Grey* v. *Richardson, supra.* If they had paid all rent that became due to her from her father's death to her death to an adverse claimant, it is conceived that this would be such an abatement or disseisin as to prevent her having had actual seisin during the coverture, and there hardly seems room to suggest that she could have been even for an instant in actual seisin, though as we shall see, *post*, the law will, if necessary, split an instant into fragments; Watkins, Descent, 43; *Parker* v. *Carter*, 4 Hare 400; Preston, Shep. T. 432.

[3] *Quaccarra's Case*, cited 8 Coke 96*a*; *Roberts* v. *Dixwell*, 1 Atk. at p. 109. Cp. *Watts* v. *Ball*, 1 P. Wms. 108, curtesy of land held in trust to pay debts and to convey surplus to the wife.

[4] The fact that the possession of the trustees, under such a term, may not be sufficient to charge the freeholder as terre tenant in an action for debt against him by rentcharge under the doctrine of *Thomas* v. *Sylvester*, by no means concludes that their possession is not sufficiently the freeholder's for purposes of curtesy. As to *Thomas* v. *Sylvester*, see article by the author, 60 Law Journal 676, 701, 720, and by Mr. Cyprian Williams, 13 L. Q. R. 288.

[5] Perkins, s. 470; Doct. and Stud. Dial. ii, ch. xv; Brooke, Abr. Garde 110.

this would have put her into actual seisin, and in various other ways she could, though unknown to herself, have got actual seisin.[6]

Where no *legal* opportunity occurred during the coverture of getting actual seisin of the hereditament of which the spouses in the wife's right were seised in law, then the husband was excused from performing what was in law legally, as distinct from physically, impossible.

Thus suppose a rentcharge in fee or tail came in possession to the wife during the coverture, but she died before any instalment became legally due to her [7]; or suppose an advowson in gross came to her during her coverture, and the church did not fall vacant [8]; or suppose an advowson in gross, descended on the wife and her two elder sisters as coparceners, and the sisters made partition to present by turns, and the two elder presented in their turn, but the church did not fall vacant a third time during the wife's coverture,[9] in all these cases the husband had his curtesy.

We spoke of an advowson in gross; had the advowson been appendant or appurtenant to land or a manor, then unless actual seisin had been obtained of the land during the coverture, the husband would not have curtesy of the advowson, even though the church did not fall vacant during the coverture, for the accessory, the advowson, yields to the principal, the land; to which it is appendant or appurtenant.[1]

Another illustration of the rule that where no *legal* opportunity occurs during the coverture to get actual seisin of a seisin in law, the husband will be excused, is seen as a result of section 33 of the Wills Act, 1837.

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[6] Refer to Watkins, Descent, 60; *Sterling* v. *Penlington*, 9 Mod. 248; *Re Hobbs*, 36 Ch. D. 553.

[7] Perkins, s. 469; FitzH. Abr. Descent, 3; Co. Litt. 15*b*, 29*a*; *De Grey* v. *Richardson*, 3 Atk. p. 471; Brooke, Tenant by Curtesy 5; Kitchin on Courts, p. 160. In *Dettrick* v. *Bradburn*, 2 Sid. 117, Glyn C.J. was of opinion that if rentcharge in fee be granted to the wife to begin at C's death, and the wife dies before C, her husband will be curtesiable; *sed quaere*, the husband in no sense would be said to *remain* in of the *wife's rentcharge*, see *ante*, p. 93.

[8] Perkins, s. 468; Doct. and Stud. Dial. ii, c. 15; FitzH. N. B. 149*d*.

[9] Brooke, Tenant by Curtesy, pl. 3. Brooke here rather suggests that the case would be the same were the church to fall vacant during the wife's life (and cp. Perkins, s. 468), the suggestion being that the presentation of the two elder sisters was sufficiently the actual seisin of the third. But as the three sisters were no longer tenants in common in truth of the whole advowson, as they had contractually made the only partition an advowson is capable of, viz., to present by turn, and each had the severalty of her turn, this position has not been generally accepted: Keilway, p. 1, pl. 1; FitzH. N. B. 149*d*; Co. Litt. 29*a*, Hargrave's Note (5); Mirehouse on Advowsons, 55; the statute 7 Anne, c. 18, cited Watkins, Descent, G2, note 2, seems directed to counter Brooke's suggestion; and see s. 12 of the Statute of Limitations, 3 & 4 Will. IV, c. 27.

[1] Co. Litt. 29*a*, Hale's Note (4); Watkins, Descent, 68-70; Mirehouse, Advowson, 54.

Thus if a father devised land in fee to, or in trust for, his married daughter, who predeceased her father, leaving issue living at her father's death, the devise no longer lapsed, but took effect as if the daughter had survived her father, and her husband might be curtesiable, since no legal opportunity of getting actual seisin could occur in the wife's life.[2]

But at common law the husband had to get actual seisin during the coverture in his wife's right, not merely in his own right; and he might so act as to be estopped from denying that the actual seisin was obtained in his own right.

Thus a lady, really tenant in tail, but thought to be tenant in fee simple, by antenuptial lease and release (always an innocent conveyance) conveyed the land to the use of the man she afterwards married for his life, remainder to herself for life, remainder to her first, etc., sons of the marriage in tail. After her death the son of the marriage entered on the father's assignees in bankruptcy: it was held that by the antenuptial settlement, the father had lost the curtesy he would have taken of his wife's estate tail [3] had the settlement never been executed. For by the antenuptial innocent conveyance of the wife, she had effectually conveyed to her husband an estate for her own life, and consequently during the marriage she had by reason of that conveyance only, in any case, a reversion in tail.

The actual possession, or entry of the wife, was always reckoned that of the husband in her right, should he not disclaim it, even though it was without his knowledge at the time.[4]

And now that the wife can by the M. W. P. Acts hold her property as separate property at law, as she could formerly hold in equity, when it was settled to her separate use, it will, I conceive, be held that the actual possession of the husband is that of the wife, when they are living in amity, even though temporarily separated.

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[2] *Eager* v. *Furnivall*, 17 Ch. D. 115; *Re Derbyshire* (1905), 75 L. J. Ch. 95.

[3] *Doe* d. *Neville* v. *Rivers*, 7 T. R. 276; cp. Brooke, Curtesy (1). In *Steadman* v. *Pulling*, 3 Atk. 423, the agreement between the widow and her second husband related only to the land that had been the first husband's, and not to the widow's own land. As to whether or not the husband had curtesy, where he had made a feoffment (which till 8 & 9 Vict. c. 105, s. 4, passed a tortious fee) of his wife's land, to a stranger on condition, and re-entered for breach of the condition, see Perkins, s. 474, and note; Co. Litt. 30*b*, 297*b*; Bacon, Abr. Curtesy, 562; Kitchin on Courts, p. 160. And see *post*, as to estoppel, p. 115.

[4] Perkins, ss. 46, 458; Watkins, Descent, 64, note (6), as to his right to disclaim. See, *post*, Note A at end. As to entry on to one parcel of land in name of all parcels of land in the same county being good for all in that county against the same disseisor, see Litt. ss. 417, 418; Co. Litt. 252*b*, 253*a*; and as to possession sufficient to interrupt the running of the Statute of Limitations, see 3 & 4 Will. IV, c. 27, s. 10, and Carson R. P. S. notes thereto.

For example, land in tail, in vacant possession,[5] comes to the wife while she is visiting her relations in Australia, on which visit she dies. In the meantime, before her death, her husband has entered on the land generally, though not expressly to his wife's use[6]; he will, we conceive, be curtesiable.

We now turn to curtesy in equity.

Equity.

As the common law, the common custom of the realm, gave curtesy, equity, which follows the law when there is no equitable reason to the contrary, follows the law in regard to equitable estates as nearly as it can.[7]

On this principle we find it stated as early as the reign of Henry VIII, that the physical impossibility of the getting of actual seisin before the wife dies, is no more an excuse to the husband in conscience or equity than it is at common law.[8]

Indeed, even while equity refused, as it did, before, at, and for long after the Statute of Uses,[9] to give curtesy of the old equitable use—which we should now call an equitable *estate*—it was but following the law, as the equitable use itself was then understood.

For, as we have seen,[1] there was originally no curtesy at law of the wife's right of action, that is, of her land of which she had been disseised, and when her old estate therein could no longer be restored by mere entry, and when an action at law was necessary to recover it.

Now in early days the right of the equitable *cestui que use* was not looked on as an *estate* even in equity,[2] but as conferring a mere equitable right of action, enabling him in equity to compel the feoffee to the use to make estates at his direction,[3] account to him for the profits,[4] and if evicted, on indemnity from *cestui que use* to bring possessory actions to recover the land.[5]

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[5] A tenant's occupation would give her actual seisin, *ante*, pp. 104, 105.

[6] If he entered expressly claiming to his own use and maintained that position during the wife's life, one conceives that he would be estopped from asserting that she, during her life, acquired actual seisin. See *Neville* v. *Rivers* and other authorities cited, *ante*, p. 107.

[7] *Casborne* v. *Scarfe*, 2 J. & W. p. 198, note; *Morgan* v. *Morgan*, 5 Mad. 411; *Cooper* v. *Macdonald*, 7 Ch. D. pp. 295, 296.

[8] Doctor and Student, Dial. II, chap. xv, *ante*, p. 105.

[9] Perkins, ss. 457, 463; Doct. and Stud. Dial. II, chap. xxii (ed. 1761), p. 70; Co. Litt. 29*a*; Preamble to the Statute of Uses.

[1] *Ante*, p. 12.

[2] *Casborne* v. *Scarfe*, 2 J. & W. p. 198, note; 1 Atkyns, 603.

[3] Brooke, Conscience, (5) (18) (29).

[4] *Mears* v. *St. John*; Coke, 4th Inst. 86, 87; Bacon, Uses, 10; Shep. T. 502.

[5] Brooke, Conscience, (9) (10) (27); Bacon, Uses, 10: possessory not real actions,

Later on, the more especially because of the great victory won under James I by Lord Chancellor Ellesmere over Coke C.J. the power of equity as against the common law courts was greatly increased.

So that by the eighteenth century we find equity able now to look on the equitable use as being in equity a true equitable *estate*, and no longer as a mere equitable right of action.

Accordingly we find it decreed in A.D. 1705, that where money is given to trustees to purchase land to be settled on the wife in tail, her husband may be curtesiable of such money.[6]

Thenceforth curtesy is extended to all equitable estates, not settled to the separate use on the same principles as at common law.[7]

But of course the spouses could not get actual legal seisin of the land, for that was as a rule vested in trustees.

But to found equitable curtesy it was necessary for the spouses to get during the coverture through the trustees, or in themselves, such a possession as the Court of Equity considered equivalent to an actual legal seisin of a legal estate.[8]

Then came the question whether there could be curtesy of an equitable estate settled to the separate use of the wife.

The difficulty here was that in equity the husband had no right whatever to the enjoyment of the estate during the coverture, and the wife could dispose of it *inter vivos*, or by her will,[9] so as to exclude her husband.

How then could the husband be said to continue an estate after his wife's death, which in equity was never in him?

But after some contrary opinions,[1] it is now completely settled that if the wife does not exclude the husband by deed or will, the separate use is at her death exhausted,[2] and that the husband

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because a trustee could not be expected to wage physical combat for *cestui que trust*.

[6] *Sweetapple* v. *Bindon*, 2 Vernon, 535, followed in *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Dodson* v. *Hay*, 3 B. C. C. 404; *Follett* v. *Tyrer*, 14 Simon, 125.

[7] *Casborne* v. *Scarfe*, 1 Atk. 603 (A.D. 1738), wife's equity of redemption: *Watts* v. *Bull*, 1 P. Wms. 108 (A.D. 1708), land in trust to pay debts subject thereto the wife's. But equity prevented curtesy of a legal estate held by the wife as trustee for others; Gilbert, Uses, by Sugden, 18 note; Sanders, Uses I, p. 391; equity relieved the husband against a term of years to attend the inheritance set up by the wife's heir; *Snell* v. *Clay*, 2 Vernon, 323.

[8] *Casborne* v. *Scarfe*, 2 J. & W. p. 197. Note *Parker* v. *Carter*, 4 Hare, p. 413; the same reasoning is implicit in *Eager* v. *Furnivall*, 17 Ch. D. 115, and *Roberts* v. *Dixwell*, 1 Atk. p. 609. Where no trustees were appointed the Court decreed the husband to hold the legal estate as trustee, *Bennett* v. *Davies*, 2 P. Wms. 316.

[9] Though her testamentary power was not established beyond all possibility of cavil till *Taylor* v. *Meads*, 4 De G. J. & S. 497.

[1] *Hearle* v. *Greenbank*, 3 Atk. p. 715, 716: *Moore* v. *Webster*, 3 Eq. 267.

[2] Compare the Scottish cases cited in *Re Mackenzie*, [1911] 1 Ch. p. 603.

shall have curtesy of land given to the wife's separate use in equity.[3]

And on the same principle, it has been established that the husband can have curtesy of his wife's property made by the M. W. P. Acts her separate property at law.[4]

But equally as at law her husband had, so now has the wife, to get actual seisin during the coverture, of her tenement to found her husband's curtesy.

Thus where a father after the M. W. P. Act, 1882, conveyed land to his daughter, but remained in possession, though she recovered judgment against[5] him, but never entered under delivery in execution or otherwise, her husband failed of curtesy.[6]

Where land is vested in a trustee for the wife, then if there is adverse occupation throughout the coverture, not only to the wife, but also to the trustee, there can be no curtesy.[7]

But if the claimant instead of claiming adversely to the trustee, claims, but wrongly, that he, the claimant, and not the wife, is the rightful *cestui que trust*, then as he is basing his claim *under* and not against the trust, and as the trustee's possession enures for the rightful beneficiary, it seems that the wife will be deemed sufficiently in equitable actual seisin through the trustee to support curtesy in the husband.[8]

Where land was legally vested in a trustee, in trust for a father for life, with remainder for his two children, a son and married daughter, as tenants in common in fee, and on the father's death his widow wrongly entered and remained in for the rest of her life, and the daughter died during the widow's life, it was held that though the widow's entry was adverse both to the trustee and the children, yet that an instant must be deemed to have elapsed between the death of the father and the entry of his widow,[9] in which instant the trustee must have been deemed to be in actual possession for the children, and that such

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[3] *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288; *Appleton* v. *Rowley* (1869), 8 Eq. 139; *Follett* v. *Tyser* (1844), 14 Sim. 125; *Morgan* v. *Morgan* (1820), 5 Mad. 408; *Roberts* v. *Dixwell* (1738), 1 Atk. 607.

[4] *Hope* v. *Hope*, [1892] 2 Ch. 336; *Parks* v. *Hegan*, [1903] 2 Ir. R. 643. Cp. *Re Derbyshire*, 75 L. J. Ch. 95.

[5] Cp. *Sterling* v. *Penlington*, 9 Mod. 247; Perkins, s. 370.

[6] *Parks* v. *Hegan*, [1903] 2 Ir. R. 643.

[7] *Parker* v. *Carter*, 4 Hare, p. 413.

[8] *Ibid.* p. 414; cp. *Sterling* v. *Penlington*, 9 Mod. 248: a case of a tenant in common asserting that he is holding for himself *and his fellows*, but claiming mistakenly that his fellow is still alive, against the heir of his fellow. The 3 & 4 W. 4, c. 27, s. 12, does not seem to alter the law in such a case.

[9] Compare Watkins, Descent, 43, Prest. Shep. T. 432, that the law will, where requisite, split a moment of time.

consequential momentary actual seisin during her coverture founded the curtesy of the daughter's husband.[1]

Tenant by the curtesy of an equitable estate could not, of course, maintain ejectment at law.[2]

NOTE A.

Inchoacy of Curtesy. Various Rights and Liabilities in respect of Curtesy. Determination of Curtesy.

Various important consequences obtained from the husband acquiring a title inchoate during the marriage on birth of inheritable issue, in his wife's tenements of inheritance in possession.

We say in possession, for he had no inchoate title whatsoever in her remainder or reversion on a freehold interest. Thus where a husband went bankrupt, but obtained his discharge before his wife's remainder fell in, which it did during the coverture, he had not even an inchoate interest to vest in his trustee in bankruptcy.[3]

But where the other conditions for curtesy attached, there can be no doubt that under the old law his inchoate interest would vest in the trustee in bankruptcy.[4]

Now that the wife can *inter vivos* or by will exclude her husband from curtesy altogether in her property settled to her separate use, or at law under the M. W. P. Acts her separate property, it is conceived that the husband cannot have even inchoate title in such property; the utmost he can have is the bare possibility that his wife will not exclude him from curtesy,[5] which is not property at all, and is no more than a *spes successionis*.

The husband in releasing his inchoate title, of course, gave value; but not in releasing his possibility of curtesy in property settled to his wife's separate use.[6]

During the coverture the estate is one and single: at common law after issue inheritable the whole fee was in the husband alone, but in his wife's right[7]; and now that under the Acts

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[1] *Parker* v. *Carter*, 4 Hare, 400. See *ante*, p. 103.
[2] *Doe* d. *Rees* v. *Williams*, 2 M. & W. 749; Cole on Ejectment, 66.
[3] *Gibbons* v. *Eyden*, 7 Eq. 371, cited in *Eager* v. *Furnivall*, 17 Ch. D. p. 115.
[4] *Griggs* v. *Gibson*, 1 Eq. 685.
[5] See *Sharmar* v. *Sedgwick*, 24 Ch. D. 597.
[6] *Re Foster and Lister*, 6 Ch. D. 87; *Sharmar* v. *Sedgwick*, 24 Ch. D. 597.
[7] Litt. c. 90; cp. *Bates* v. *Kesterton* [1896] 1 Ch. 159, *ante*, p. 93.

the wife can hold at law, it remains, of course, single in her, though she be restrained from anticipating the corpus, and nothing in the nature of a settlement is created during the marriage, so the wife had not the statutory powers under the old Settled Land Act, 1882.[8]

As the husband held the fee, but in another's right, his wife's, his prenuptial term in the same land, in his own right, would never have merged even at law.[9]

In certain cases (now obsolete) the time of birth of a child might have been material to the husband.

Thus had the wife been attainted of felony before issue had, the land escheated; if she committed the felony after issue had, the husband held for his life against the lord.[1]

If the wife's villein purchased land in fee before issue had, the lady's husband entering held such perquisite only in his wife's right. If the purchase was after, he held such perquisite in fee.[2]

If the wife's female villein, called a niefe, purchased land, then if the lady's husband entered on a niefe before the latter had issue, the niefe's husband lost his curtesy, otherwise not.[3]

Tenant by the curtesy is impeachable for waste by the statute of Gloucester.[4] Before the statute it seems the better opinion that he was not so impeachable, because during his wife's life he had held the inheritance in her right, and he did not hold of her heir. The fact that he once held the inheritance is the reason why tenant in tail after possibility of issue extinct, who really holds in quantity no more than a life estate, is not impeachable for waste.[5]

A daughter heir in tail of a mother tenant in tail deceased, who before her death had apparently contracted with her husband and his father (how could she do this in A.D. 1657?) to sell them timber, restrained her father, tenant by the curtesy, from cutting

[8] *Bates* v. *Kesterton*, *supra*, but now under the S. L. Act, 1925, s. 1 (i) (iv), s. 20, sub-s. 1 (x), s. 25, she has those powers; where she takes under *will* or *intestacy*, see s. 1, sub-s. 1, s. 117 (xxiv), and s. 30, sub-s. 3, the personal representatives are trustees for S. L. Act; but when she takes under deed it seems they must be appointed.

[9] *Jones* v. *Davies*, 5 H. & N. 766, 7 H. & N. 507.

[1] Co. Litt. 351*a*; Brooke, Tenant by Curtesy, Pl. (3) and (15); Kitchin, p. 160; Hale, pl. Cor. (ed. 1778), p. 359.

[2] Co. Litt. 124*b*.

[3] Brooke, Tenant by Curtesy (14); Viner, Curtesy (1) and (2).

[4] Statute of Gloucester, 6 Edw. I, c. v. A.D. 1278; Coke, 2nd Inst. 298; FitzH. N. B. 56; even though he be an infant, and the waste is done by a stranger: Coke, 2nd Inst. 303.

[5] Litt. ss. 34, 352; Doctor and Student, Dial. II, ch. 4; Coke, 2nd Inst. 145; *Lewis Bowles' Case*, 11 Coke, 79*b*, 2nd Resolution; however, Coke, 2nd Inst. 299, says that waste lay at common law against tenant by the curtesy; *sed vide contra* (*ibid.*) 145, and see 300.

that timber [6] after her mother's death. The position would have been the same had the mother had the right to contract, unless she had contracted under statutory powers that bound her heir in tail; for timber is part of the inheritance, and though tenant in tail is, of course, unimpeachable, the severance must take place in his life.

The heir or reversioner may enter to see if waste has been done.[7] And tenant by curtesy is liable for waste committed by a stranger against his will, and in general for waste committed by the assign of his life estate.[8]

Tenant by the curtesy has the powers of a tenant for life under the Settled Land Acts.[9]

The husband, under statute of Henry VIII, had during his wife's life power to lease her land for three lives or twenty-one years, provided she joined in the deed, but he could not otherwise than by fine levied with his wife's concurrence aliene the rent reserved for more than the period of the coverture.[1]

A tenant by curtesy granting a lease under the Settled Land Acts or otherwise, should reserve the rent in general terms, doing which will carry it with the reversion, for if he reserves it simply to himself and his heirs, such a reservation might possibly upset the lease, as the rent is by the reservation severed from the reversion.[2]

At common law a husband could always disclaim his wife's acquisition made after and during the coverture, by way of purchase, as distinct from by way of act of law,[3] provided he had not assented to it.

To this rule there was this exception, that if he had wrongfully aliened her estate, he could not disclaim a conveyance, which would have the effect of remitting her to her former rightful estate.[4]

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[6] *Roberts* v. *Roberts*, Hardres, 96; see Brooke, Contract 26; Shep. T. 238, 244.
[7] Coke, 2nd Inst. 306.
[8] See Doctor and Student, Dialogue II, ch. iv; Coke, 2nd Inst. 300; FitzH. N. B. 56 c.
[9] See S. L. Act, 1925, s. 20, sub-s. 1 (vii), sub-s. 3, s. 30, sub-s. 3; S. L. Act, 1882, s. 58, sub-s. 1 (viii), 1884, s. 8.
[1] Hen. VIII, c. 28, ss. 1, 3.
[2] Consider *Thomson's Case*, Latch, 45; *Stacey and Clark's Case*, cited Palmer at p. 484.
[3] Perkins, ss. 44, 45; Doct. and Stud. Dial. II, ch. iv; Brooke, Feoffment de Terres (36), Condition (55); Co. Litt. 3*a*; Prest. Abstracts III, p. 104; Shep. T. 235; *Butler* v. *Baker*, 3 Coke, 29*a*; *Grabrand* v. *Allen*, Comberbatch, 450. After 1845, 8 & 9 Vict. c. 106, s. 7, she could, examined and with her husband's concurrence, disclaim by mere deed. It seems clear that he could not disclaim his wife's estate *descended* during the marriage; Doct. and Stud. Dial. II, ch. iv, *ad finem*, unless by leave of the Court after examination of the wife.
[4] Litt. s. 677; *Thompson* v. *Leach*, 2 Vent. p. 201.

If the husband had assented to such purchase, he could not, of course, on her death disclaim curtesy. Even at a time when it was considered that by the custom a wife could devise to her husband land in an ancient city where custom of devise held, and she devised to her husband for life, he had to be in of his older and better title of curtesy given him by the law.[5]

As a general rule (though there are certain exceptions even to this rule) the common law, in its policy of keeping the legal seisin full and certain, would not allow[6] of disclaimer of an *estate* cast by the *common* law upon a person. Could therefore the husband ever disclaim curtesy of his wife's separate property at law under the Married Women's Property Act?[7]

But this rule could never have had application to curtesy of an equitable estate, for the legal seisin was full of the trustees. The trustees indeed might in certain cases insist on being relieved of the *legal* estate,[8] but if they did not so insist, it seems clear that the husband could disclaim curtesy of his wife's equitable estate, and so disclaiming, the trustees would be discharged of all trust for him, and so beneficially entitled themselves for the rest of his life.

The like principle seems to follow under the new legislation, as by that the only estates in respect of which curtesy can in future arise are turned into equitable estates.

Of course, now the husband can take a life estate under his wife's will devising land settled to her separate use or under the Acts her separate property at law, for the separateness of her property and the incidents thereof are not exhausted till her devise is spent.

It seems to have been once suggested, under the old law, that where the wife tenant in tail was put to her election, if the husband and wife differed as to how the election should be made, a Court of Equity would elect for them according to what was best for the wife so as to bind the husband's curtesy, but as the husband had the rents and profits for his whole life such a general proposition would seem to be a strong encroachment of equity and, indeed, unsustainable.[9]

[5] Co. Litt. 30*a*; Doct. and Stud. Dial. II, ch. iv.

[6] Coke, 2nd Inst. 286; *Humphrey* v. *Morse*, 2 Atk. 408; Standeforde, Prerogative, 54. In *Re Scott*, the life estate disclaimed by the devisee, who was also heir, was taken by him by purchase, not, of course, by descent.

[7] Doctor and Student, Dial. II, ch. iv., at end; may be intended only of nondisclaimer of wife's purchase to which husband had assented: Preston, Shep. T. 235.

[8] *Cary-Elwes' Contract*, [1906] 2 Ch. 143; *Re Flamank*, 40 Ch. D. p. 468.

[9] See *Cavan* v. *Pulteney*, 2 Ves. 560; but see in effect *contra*, *Griggs* v. *Gibson*, 1 Eq. 685; *Brodie* v. *Barry*, 2 Ves. & B. 127, 134; *Wall* v. *Wall*, 15 Sim. 513, 521; and the wife's equity to a settlement could not be carried out

Of course, where both properties between which the election had to be made had come to the wife *before* her marriage, there would be less objection to such a proposition, for the husband could never disclaim his wife's prenuptial acquisitions.

Should tenant by curtesy purport to convey the tenement for an estate greater than for that of his own life, his innocent conveyance, unless in exercise of some statutory power, would pass no greater estate than that for his own life, and on his death the purchaser's estate would *ipso facto* cease without entry by the wife's heir or other person entitled.[1]

But even while a feoffment in fee passed a tortious fee, had husband made such feoffment after issue had, the wife's heir could not enter on the alienee during the husband's life for the forfeiture: for the husband had at time of feoffment title to hold for his life.[2]

Should the husband during his wife's life have conveyed under the old law to A for the lives of B, C and D, and then survive his wife, and also those lives some of whom also survived the wife, he would have no curtesy of the reversion expectant on a freehold subsisting at his wife's death.[3]

The husband, of course, might always, by antenuptial agreement, have barred himself in equity from curtesy; and in principal his antenuptial agreement to that effect, though he were an infant at the time of marriage, would be binding; for, by doing so, he did not give up what he already had: he was entering as he might do into the greater contract, the contract of marriage, and consequently could agree to abandoning rights which the marriage might confer as a condition of the lady's agreement to marry at all.[4]

Of course, a husband could always expressly release his right to curtesy after the marriage,[5] and so act in conducting litigation for his wife's child as impliedly to release it.[6]

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against the husband's will so as to affect his possible curtesy: *Smith* v. *Matthews*, 3 De G. F. & J. 139, 153.

[1] *Miller* v. *Mainwaring*, Cro. Car. 397. The tortious operation of feoffments was abolished 8 & 9 Vict. c. 106, s. 4.

[2] Co. Litt. 30*a*; Bac. Abr. Curtesy, 560.

[3] This seems clear on principle, though in the case supposed the husband would have had actual seisin under the old law during the marriage of the tenement till he afterwards leased it. I have not, however, found direct specific authority on the point. But Brooke, Tenant by Curtesy, pl. 13, seems in point. If land descends on a married daughter who enters as heir, but is displaced by birth of her younger posthumous brother, who afterwards dies, the husband shall not be tenant by curtesy, unless he actually re-enters on the land in his wife's life.

[4] See the great opinion of Wilmot C.J. given to D. P. in *The Earl of Buckinghamshire* v. *Drury*, Wilmot, 177, and that case in D. P., *ibid.*, p. 226.

[5] *Re Foster and Lister*, 6 Ch D. 87.

[6] *Stone* v. *Godfrey*, 5 De G. M. & G. 76.

And of course as to her separate property in equity or at law under the M. W. P. Acts the wife could exclude him from curtesy by giving her estate to others by deed or will.

And now under the recent legislation the wife can bar her estate tail by will, and if she does so, exclude him.

The right is not lost by the husband's elopement and adultery.[8] No man giving an estate at law or in equity, such estate being of a curtesiable nature, can by his mere declaration validly say that the husband shall not have curtesy. Curtesy is an estate given by law, and, where equitable, by equity following the law; and no person can make a private law for himself,[9] or say that an estate shall not carry the legal or equitable incidents to the estate he gives.

As curtesy was an estate given by act of law, and as an alien could not even take, far less hold, under act of law, an alien formerly had no curtesy, till the law was altered by statute[1]; and a papist whose acquisitions by *purchase* were by statute avoided, could nevertheless take curtesy.[2]

NOTE B.

In the case of *Boothby* v. *Vernon*[3] a brother devised land to his sister Anne, then a spinster, for her life, with remainder if she married and had issue male living at her death, to such issue in (as the Court considered) tail male, but if she died leaving no issue male living at her death, then to G. B.

The testator died, and the reversion in fee of the land at his death descended on Anne, who afterwards married the defendant Vernon, by whom she had a son and daughter; both children survived her, but afterwards died, and on their deaths G. B. became heir of both Anne and the testator.

The defendant Vernon claimed curtesy, on the ground that there had been a fee simple in Anne, by the union of her devised life estate and the descended reversion. But the Court refused the claim, on the ground that the quasi fee by union in her would on

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[8] *Re Walker*, Ll. & G. temp. Sugden, 336; *Sidney* v. *Sidney*, 3 P. Wms. 272, 276; Preston, Abstracts, iii, 385.

[9] *Hope* v. *Hope* [1892] 2 Ch. 342; Jarman, Wills (6th ed.), 702, 703; *Anon.* Dyer, 179, pl. 45. All that the case of *Bennett* v. *Davies*, 2 P. Wms. 316—somewhat misleadingly cited in Roper, H. & W. (2nd ed.), 21—decided was that the testator having devised direct to the separate use of the wife, the husband should hold the legal estate in trust for her separate use.

[1] *Collingwood* v. *Pace*, 1 Vent. 417; *Sharp* v. *St. Sauveur*, 7 Ch. 403; *Dumoncel*, 13 Ir. Eq. R. 96; Preston, Abstr. i, 346; and see *ante*, p. 94, note (3).

[2] *Witherington* v. *Banks*, Sel. Ch. Ca. 30; 3 P. Wms. 49*n*.

[3] 9 Mod. Rep. 147, A.D. 1726.

her death open to let in the contingent remainder to her son which then vested.

Observe (1) that the son had a true contingent remainder on his mother's life estate. The case is not as if the devise had been to the mother *and her heirs*, but if she died leaving a son living at her death then to such son, in which case the son would have taken by executory [4] devise and not by way of contingent remainder. (2) That the descent of the reversion and the devised life estate taking effect at the same instant, the death of the brother, the contingent remainder was not *ipso facto* destroyed, but the fee by union in Anne would open to let in the remainder,[5] otherwise the contingent remainder could not even in inception have been created. (3) That Anne had not after her brother's death done any independent act of her own finally to merge her life estate in the descended fee simple and extinguish the contingent remainder as she might easily have done,[6] as the law then stood.

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[4] And in which case Anne's husband would have had and would still have curtesy (*ante*, p. 101), because by conceivable possibility the daughter might have inherited the mother's fee.

[5] *Lewis Bowles' Case*, 11 Coke, 79*b*. Had the brother given her her life estate by deed *inter vivos*, the contingent remainder would have been destroyed by the subsequent independent act of the descent of the reversion, by the law prior to 8 & 9 Vict. c. 106, s. 8. See *Hartpole* v. *Kent*, T. Jones, 76; Fearne, 341-346.

[6] Fearne, 344; *Egerton* v. *Mounsey*, 27 L. J. C. P. 10.

REVIEWS AND NOTICES.

[*Short notices do not necessarily exclude fuller review hereafter.*]

Roman and Canon Law in the Middle Ages. By HAROLD DEXTER HAZELTINE, Litt.D., F.B.A., Downing Professor of the Laws of England, Cambridge. (The Cambridge Medieval History, Vol. V, Chap. XXI, pp. 697-764). Cambridge: University Press. 1926.

THE Cambridge Medieval History Series, and its companion Series, form one of the great literary-scientific achievements of the present age. In scope, in authoritativeness, in style, they meet precisely a need for the educated man who is desirous to keep as closely abreast with the broad world of present historical knowledge as he is already with his own narrow professional world. Within the compass of a few volumes, he saves himself from the uncertainty that haunts him when he trusts the single, and perhaps prejudicial, historian, and from the impracticable expense of time involved in comparing numerous authorities to reach a safe point of view.

The lawyer to-day, more than ever, must keep up with history; and the Cambridge Series has not failed to give due recognition to law in history. At this stage, in Vol. V of the Series, covering roughly A.D. 1050 to 1200, a place is naturally found for an account of Roman and Canon law in the Middle Ages.

Professor Hazeltine's known style and attitude are here fitly represented in the judicious impartiality and the solid clarity of this chapter. The story is one that has never been told before in English, in this scope; and for lawyers the chapter deserves a special reprint. After a preliminary summary of the processes of growth of the Roman law in Roman times, and then of the origin of the Canon law, the author proceeds to his main subject, the later history of the Roman law in the East and in the West during the early Middle Ages, and in the several national areas during the later Middle Ages. His main questions set for answer are: By what processes did these two systems spread throughout Europe? What was the result of their contact with other systems? Where and how were they studied, and what were the results of those studies?

'Art lies in concealing art.' The story is told so lucidly and straightforwardly as to make the reader forget for the moment the vast complexity of the evolution and the ponderous multiplicity of the materials out of which the story must be extracted. As a literary achievement it is an unqualified success. As an historical pronouncement it is an enduring contribution.

In so wide a field, covered in a compass so concise, there is room only for comment on a few generalities. We shall note two or three points, simply with a view to stimulating further debate in this subject so bristling with interest.

(1) 'The medieval world is not one vast community under a single system of law and government; it is a world made up of many communities; . . . within each country particularism was one of the main features of the time' (pp. 703, 729). This feature Professor Hazeltine has emphasized more than any other writer, and soundly; it is the key to understanding the story of later Romanic law in the 1700's and the 1800's. It should be reiterated without cease.

(2) 'The Corpus Juris Canonici [of 1582, arranged in the five parts beginning with the Decretum] . . . is still the foundation of the Canon law' (p. 715). Strictly true in the broadest sense, this statement might mislead the reader who is not aware that the Codex Juris Canonici of 1917 is, in form at least, a complete official recodification of the Canon law.

(3) The history of the Justinianean law in the East (pp. 716—720) is a welcome piece of enlightenment for Occidental lawyers. There has been nothing of the kind in English before this, so far as we know. And yet the complete history of Roman law in Europe cannot be understood without laying this foundation.

Which brings us to note that the present account enables us to appreciate more fully the influence of Roman law on the Slavic legal system—the full story of which remains to be written. The main Slavic race-branches (Russian, Polish, Bohemian, South Slavic) were affected at three distinct periods, in very different ways, by Romanic law. The latest (not within the scope of this chapter) was the spread of the Code Napoleon in the 1800's; this affected all of the Slavic countries. The middle occasion was the influence of the revived Roman law in the 1200's and 1300's; this affected only Poland and Bohemia and a small Dalmatian region, though in different degrees. The very opening paragraph of the Bohemian 'Jus regale montanorum' (c. A.D. 1300) copies from Justinian's Digest the celebrated injunction 'honeste vivere, alterum non laedere, jus suum unicuique tribuere'; and Charles IV later imported the celebrated Italian Bartolus to draft his national Code, the Majestas Carolina, which, however, never became law, and later the native Bohemian law was Romanized through Austria. In Poland, Kasimir III also imported French and Italian jurists from the West; but here the Church's strong influence helped to make the Romanic impression a deeper one, and already in the 1700's the Polish statutes were dotted with such Romanic terms as 'obligi,' 'kontrakty,' 'testamenta.' But the earliest period of influence was the pre-Bartolian, and this time the influence was Byzantine, and affected the Eastern and Southern Slavs only. The lines of forces were both West and North—into Serbia and Dalmatia, and into Russia. The marked difference between this occasion and the later two is that the law which was brought this time was primarily ecclesiastical in tincture—which, as Professor Hazeltine has pointed out (p. 717), was the especial feature of later Byzantine-Roman law, as contrasted with the Justinian compilations. ('The Ecloga of Leo the Isaurian, A.D. 740, has been called a Christian law-book'). Thus, King Stefan Dushan's first Serbian Code of A.D. 1349 begins: 'Justice shall be done according to the Christian religion'; and the earliest Russian law book, the Pravda Russkaya (probably about A.D. 1200), is now believed to have been merely a book of information for

the Church Courts, drafted or inspired by ecclesiastics; for only two centuries before this the Russians had received letters and Christianity from Byzantine missionaries.

In short, the story of the influence of Byzantine-Roman law on Slavic Europe has features of interest that distinguish it from the story of Western Roman law, and this chapter enables us to trace them.

(4) This brings us to another matter, chiefly one of inference—viz., the causes and extent of the influence of Roman law upon the so-called *leges barbarorum* in the West. Professor Hazeltine more than once speaks of the 'marks of Roman and ecclesiastical legal influence, not alone in their form but also in their substance,' on 'many of these codes of Germanic law.' For reasons which are doubtless inadequate, our impression has been that this influence was neither deep nor frequent; but that is a matter of fact, on which we do not venture to make an assertion. However, the *cause* for the Germanic reduction of their customs into written codes is more a matter of speculation than of ascertainable fact; and on this point Professor Hazeltine cautiously remarks (p. 725): 'It seems to have been feared that unless the customs were reduced to writing they would suffer in their competition with the more highly developed system of Roman law.' But the Germanics were the masters; there was nothing to fear; and they would hardly have conceded in their thought that the Romans' law was superior, 'more highly developed.' We have long believed that the main reason for the Germanics' reduction of their customs to writing at that particular stage of their history was simply, Imitation. The most explanatory single fact for the thousand years of European law after Julius Caesar is that none of the Northern races—Celtic, Slavic, Germanic—possessed, originally, writing (as a means of record and instruction). Hence, when they came to live in contact with a people having a written literature, they would (being of high intelligence as races) naturally come to adopt that wonderful feature of daily life for themselves also; and law would take its turn with the rest in being put into writing. However, this is matter chiefly for speculation. But, as bearing on the above hypothesis, be it noted that the Anglo-Saxon laws (the only ones of the *leges barbarorum*, as Professor Hazeltine notes (p. 725) drafted 'in the native language of the folk') were written *in the Irish script* (not the Roman); for the Anglo-Saxons had learned their letters from the Irish missionaries. In other words, did not the several Germanic peoples put their first written laws into whatever writing they first learned, because they wanted written laws, and not because they 'feared the competition' of Roman laws?

(5) Professor Hazeltine (p. 733), in mentioning that extraordinary administrative Norman genius Lanfranc, refers to him as 'the son of a judge' in Italy, who 'early rose to a place of eminence' among the jurists of Pavia. Well, that is what all the historians do say of his origin, and Professor Hazeltine could, of course, not properly linger to discuss the evidence for this accepted belief. But, in passing, we may recall that Maitland ('History,' Vol. I, p. 55, note 2) says of Lanfranc of Pavia: 'It is not absolutely certain that this Lanfranc is our Lanfranc.' One of the most remarkable romances and mysteries of history is that of the precocious young lawyer who brilliantly confuted his elders at Pavia and then disappeared suddenly, to reappear (as believed) in Normandy as a monk, and to become one of the principal founders of England's nationality. The source of Maitland's doubt (though not specified by him) would seem to be solely the fact, unearthed by Ficker, that there were a dozen Lanfrancs

at that period in or about Pavia, and that the identity of the Pavian professor with the Norman monk-politician has not been established. Someone should some day allay this doubt.

These comments in passing are meant only to suggest the vast variety of materials over which the author has had to range in preparing this concise and polished summary of a complex mass of infinite details. It is impossible to do justice to the erudition and skill which the author has brought to bear in giving us this safe and lucid guide to the grand panorama of medieval law in Europe.

JOHN H. WIGMORE.

A Bibliography of Early English Law Books. Compiled for the Ames Foundation by JOSEPH HENRY BEALE. Cambridge, Mass.: Harvard University Press. London: Humphrey Milford. 1926. 4to. viii and 304 pp. (31*s.* 6*d.*)

LAW-BOOKS do not as a rule offer much attraction to book-lovers, and legal bibliographies are no prettier than treatises and digests. But Prof. Beale has made a brilliant exception by giving us in an appendix, excellently reproduced, the ornamented title-pages and other devices of old law publishers, which very few of the profession ever have occasion to see: the books have either gone out of use or been replaced by modern editions (commonly very meanly produced work of the eighteenth or early nineteenth century). Here one shall see the title-page of Staunford's 'Pleas of the Crown' (Tottell, 1574) flanked by a grizzled Adam and a rather melancholy Eve, leading (it seems) Cain and Abel respectively. Were they stolen from some German print of the Cranach school? Here be griffins, elephants, cherubs and emblematic seasons, and studious (or singing) *putti* meandering round the marginal decorations. Here, somewhat earlier, are the Royal arms supported by a bristly dragon and a rather overfed greyhound, who are evidently not on speaking terms. Also there are the printer's devices used by de Worde, Pynson, Redman and others. A little apart from the Renaissance adornments of our lady the Common Law we have the more severely ecclesiastical illustrations of Lyndwood's 'Provinciale,' a book which ran through many editions (some elegantly got up with rubricated titles and head-lines). Brickman's edition (*honesti mercatoris*), printed at Antwerp in 1525, has a bold woodcut of St. George and the dragon on the special title of the index, a better piece of work than the general title-page. Law booksellers in those days had more respect for their books than their successors. From Blackstone's time onwards until our own the external production of law-books was too often execrable, the printer's taste, if any, being worse than none. Things are mending now both here and in America, provided always that the vile material called law calf, and the viler called sheep, neither of which we have seen for some time, are really extinct.

The illustrations of the assize of bread, showing the baker at work and the standard patterns of loaves, are amusing though not ornamental.

We really have nothing to say about the letterpress of this attractive volume except that, notwithstanding Prof. Beale's modest disclaimer of competence, we believe that by this time he knows a great deal more about bibliography than we do. Satisfaction of the more minute demands made

by the professed bibliophile is not attempted, and among those whom the book will chiefly interest we do not think it will be missed. The system of the index tables at the end is rather complicated, but probably the nature of the various contents would not suffer it to be made simpler.

F. P.

Calendar of the Patent Rolls Preserved in the Public Record Office. Edward VI; Vol. III (1549—1551). London: His Majesty's Stationery Office. 1925. 4to. 437 pp. (£1 10*s.* net.)

A VALUABLE volume, brimful of interest to all manner of people, historians, topographers, genealogists, antiquaries—a blessed word which covers a multitude of students with multifarious purposes—*et omne hoc genus*. Like the two preceding volumes of the same reign it is largely concerned with grants of the endowments of the ancient chantries, anniversaries, dirts, lamps and the like, of which there were an enormous number, spread throughout the length and breadth of the country. For centuries before scarce any man or woman of means had omitted to make testamentary provision for such endowments; and now by virtue of the Act suppressing the chantries, etc. (1 Edw. 6, c. xiv), all these endowments were at the disposal of the King, and he and his advisers must have had a busy time of it granting them away to all manner and sorts of people, sometimes in consideration of a payment in cash, sometimes in reward for services rendered. These very numerous grants will be of great value to all those who are interested in the devolution of Church property. They are valuable also as a source of information of the rental values of property of various kinds all over the country as well as in the City of London. Nor is their interest even then exhausted. They provide us with a host of field-names which the local topographer, to say nothing of the etymologist, will find a profitable browsing ground. We have several very long lists of presentations to ecclesiastical benefices which may be useful to those who are trying to supply missing links in a series of local vicars or rectors. Hosts of foreigners are granted 'denization,' what to-day we call letters of naturalization. One single list of these contains nigh five hundred names. There are grants of annuities to various persons during the King's pleasure, notably one of £100 to Martin Bucer, 'professor of theology'; a grant of many manors and their appurtenances to 'the King's sister, Elizabeth,' the enumeration of which fills nearly five pages of the Calendar. It is said to be in fulfilment of Henry VIII's will and is dated 17 March, 1550. The grant is immediately followed by a note to the effect that it is vacated because it was personally surrendered and cancelled 23 April, 5 Edward VI. Interesting information is given to us on such matters as the pay of officers and private soldiers in the early years of Edward VI, and the prices of such things as cinnamon, starch, dates and the like. As in the preceding volumes of the reign the grant of pardons to many malefactors is recorded, many of them, apparently, malefactors of a bad type, no explanation of the extension to them of the royal mercy being given. It is impossible to review in detail within permissible limits of space a book like the present, crammed as it is with records of all kinds of unconnected facts. Still, it is possible to note a few of these things, presenting them as samples of the fare provided for those who will turn over the pages of the volume for themselves.

We will begin with the following little story. 'Because Oliver Godfraye, rector of Pensherste, Kent, being 65 years old, suffers continual torture in his feet, and his disease, partly by the ignorance and carelessness of the unskilful professors of the healing art in the country, partly also owing to the inveteracy of the evil, grows daily worse nor can be expelled without aid of skilful physicians and surgeons, usually scarce in the country, the King, who is sorry for his calamity and is the soul of the law, thinks to handle the reins so that laws made to restrain the wicked and perverse may not punish the innocent: Licence, therefore to the said Oliver at his pleasure, for the sake of recovering health, to absent himself from his rectory of Penherst as also from that of Southechurch, Essex, nor reside in either of them, notwithstanding the statute of 21 Henry VIII; but when absent from either he must hire suitable ministers to attend the flock, celebrate divine things, minister Sacraments and perform other duties'—an interesting illustration of Edward VI's views as to the dispensing powers of the Sovereign. Not only does the King declare himself to be the soul of the law but he would have us know that he is the enthusiastic patron and supporter of scholarship. 'Whereas in his singular love for good letters the King has determined to stock his library of Westminster with notable books to be kept conveniently for his use,' he appoints Bartholomew Traheron to be keeper of the said library with a yearly salary of twenty marks sterling. The appointment of Peter Vannes as the King's Secretary for the Latin tongue is noted; but Peter is to have forty marks a year. While the Latin secretary is to have forty marks, something over £26 a year, William Paulet, whom the King had created Earl of Wiltshire, receives a yearly grant of £20 'in support of that dignity'; which does not strike one as a particularly munificent endowment for an earldom. Under the date of 13 October, 1549 (3 Edward VI), we find it noted that, 'whereas by patent 24 December, 1 Edward VI, Edward, Duke of Somerset, was appointed governor and protector, he has since so abused the trust reposed in him that the King's person has been in danger and his subjects annoyed by civil dissensions, his laws subverted and his realm in peril of utter ruin, now the King revokes and annuls the said patent.' It is a matter of history that the Duke was beheaded in 1552.

As a general rule the editor of this volume does not give us the original Latin of the enrolments, but now and again he does; perhaps when he does not feel complete confidence in his translation. It is worth while noting one of these instances. There is a grant of *gardinum et ortum* in Bristol. These Latin words are rendered simply as 'the garden,' the editor probably considering the expression as merely tautological; though in another place he translates *gardinum sive hortum* as a 'yard or garden.' *Gardinum* is the old law Latin for 'orchard.' Some of the contemporary renderings of English place-names in Latin are quaintly amusing. There was a Newark Priory in Surrey and a College of Newark in Leicester. Why should the former be *monasterium de Novo Loco*, the usual medieval form, we believe, while the latter is *collegium Novi Operis*? Enough has now been said, we hope, to show the great general interest of this volume to many classes of students. By and by, when we get the promised volume of Indices to this volume and the two preceding ones, these Calendars will be much more useful to research students than even they are at present.

W. C. B.

La Théorie Anglo-Saxonne des Conflits de Lois. Par Hugh H. L. Bellot, Secrétaire-général de l'International Law Association, ancien professeur à l'Université de Londres. Académie de Droit International: Extrait du Recueil des Cours. Paris: Librairie Hachette. 1925. 74 pp.

Dr. Bellot's monograph will be read with great interest by the lawyers of all countries. His subject is broader than the title of his monograph indicates, since he takes the historical foundations of private international law and the theories of the world's jurists for his province. In the first chapter he carries us from the times of the Roman Empire into the Middle Ages; he shows us the significance of the *ius civile* and the *ius gentium* for the Romans, and he sketches the progress in medieval centuries from a system of personal laws to a *régime* of territorial laws. The influence of feudalism in effecting this change is explained; the significance of the medieval renaissance of Roman law and of the growth of the *lex mercatoria* as a body of world law is considered; and the rise of the laws of towns is brought within the survey. The second chapter consists of a brief historical treatment of juridical and political theories in England and the United States of America, chief attention being devoted to the medieval conception of law and the history of the theory of sovereignty; while the application of foreign law by English Courts since the Renaissance is the subject of the third chapter. In the fourth chapter the author gives us a summary of the views of leading continental jurists in respect of the conflict of laws. Four centuries of juristic thought upon this subject are subjected to review:—the French school of the sixteenth century (Dumoulin, d'Argentré), the Netherlands school of the seventeenth century (Bourgoigne, Paul Voet, Huber, Jean Voet, Grotius), the French school of the eighteenth century (Bouhier, Boullenois), and the continental jurists of the nineteenth century (Foelix, Von Wächter, Von Savigny, Von Bar, Meili, Pillet, Jitta). The fifth chapter is a survey of the views of leading English and American jurists upon the nature of the conflict of laws; it is a survey which includes Malynes, Beawes, Story, Burge, Wheaton, Beach-Lawrence, Phillimore, Wharton, Westlake, Dicey, Foote, and Baty. In the sixth chapter the author not only gives us the views of still other modern Anglo-American jurists, notably those of Bate, Lorenzen and Beale, but he also summarizes the results of his study and draws certain interesting conclusions in respect of the doctrines held by jurists upon the subject of the conflict of laws.

Dr. Bellot has covered a vast field of history and theory in a brief sketch of much value. Although compression has been one of the necessities incident to the writing of an essay of this character, the style is, in general, lucid; only rarely is it invested with vagueness. Occasionally Dr. Bellot is far too dogmatic in his statements. But the difficulty with such statements is not vagueness; the difficulty lies in the fact that, although they are clear, their sweeping and general character leaves things unsaid which ought to have been said, and thus distorts the historical balance and perspective. While historical and theoretical lines of thought are evidently intended by the author to be a cement binding the several chapters into an entity, it must be admitted that this design has been only partially successful in the actual accomplishment. Apart from the

fact that in portions of the earlier chapters the progress of thought is somewhat checked by the introduction of certain details which have only slight bearing upon the main theme, the several chapters stand out too much as separate accounts of aspects of the whole subject-matter. There should be a clearer indication of the transition from each chapter to the next, a fuller explanation of the bearing of each step in the argument upon all the others. But let it be observed that this failure to co-ordinate the topics adequately is not noticeable in the last three chapters, which deal with the juristic theories of modern times. Here the argument is close and sustained.

Although the author has relied chiefly upon the standard modern works on the conflict of laws, he has consulted other secondary authorities and has cited some of the original sources, as, for example, the English Year-Books and Reports and volumes of materials published by the Selden Society. At the same time it is only fair to remark that the treatment of some subjects is hardly abreast of the latest scholarly research, as, for instance, the account of the Anglo-Saxon invasion of Britain and the comparison of this invasion with that of the Germanic barbarians in Gaul. Dr. Bellot's view that the Anglo-Saxons adopted *les institutions britanniques romanisées* has support in the writings of Coote and other authorities cited, but it can hardly be considered the prevailing opinion of scholars. In Dr. Bellot's pages one fails to find any reference to the views of recent scholars, such as Seebohm and Vinogradoff, who reached conclusions similar to his own; and, what is even more important to notice, one has no hint of the fact that Maitland and many other scholars of our day have held views on early English history which clearly point to a Germanic origin of our laws and institutions and which leave place for only a slight Celtic and Romanic survival from the times before the coming of the Angles and Saxons. The difficulty in accepting Dr. Bellot's teaching on the subject of the Anglo-Saxon invasion lies in the fact that he relies too much on the older writers, such as Coote and Kemble, and does not bring his scholarship up to date; and it lies also in the fact that he is too little inclined to distinguish sharply between the Germanic invasion of Britain and the Germanic invasion of Gaul and other parts of the Continent. One feels a similar difficulty in regard to Dr. Bellot's paragraphs on certain other historical matters, as, for example, his paragraphs on the views of 'the glossators' in regard to statutes. Without in any way challenging the soundness of Dr. Bellot's summary of the views of 'the glossators' upon this matter, although one wishes that he had mentioned some of these jurists by name, it should be observed that he has made no reference whatever to the views of the 'post-glossators.' The glossators dealt in their writings with various questions connected with statutes, such as the question of the relation between statutes and customs as sources of law: see Brie, 'Lehre vom Gewohnheitsrecht,' Breslau, 1899, § 15. But as Von Bar and other modern writers have taught us, it was the 'post-glossators' or 'commentators,' and notably Bartolus, who laid the foundations of a scientific treatment of the conflict of laws by developing a theory of *statuta personalia*, *statuta realia*, and *statuta mixta*: see Von Bar's article in Holtzendorff-Kohler's 'Encyclopädie der Rechtswissenschaft,' vol. ii, 1904, p. 7. The theory of statutes naturally plays a considerable rôle in Dr. Bellot's essay; he shows us, among other things, that the theory has been rejected by many modern jurists. It is the more regrettable, therefore, that in his first

chapter, which deals with the origin and history of private international law, he has not made allusion to the post-glossators and their contribution to the growth of doctrine.

Students of the conflict of laws will be glad to possess Dr. Bellot's first three chapters, but many of them will, no doubt, conclude that his main contribution to the subject consists of chapters 4, 5, and 6. In summarizing the positions of jurists, and in contrasting these positions with one another, while showing at the same time the influences and counter-influences of the jurists *inter se*, Dr. Bellot is quite clearly at home; he knows his jurists as well as he knows his London. In no other work of our day do we possess so clear and comprehensive a survey of the many theories which enliven the subject of the conflict of laws, and which invest it with a jurisprudential value. Dr. Bellot's essay is proof, if proof were needed, that the mastery of these theories held by jurists, from the time of Dumoulin and d'Argentré to that of Jitta, Westlake, and Dicey, is one of the best of all the exercises in which the student of law and jurisprudence can engage. But although Dr. Bellot has written an admirable summary of doctrine, he seems to have made no attempt to include the views of all of the leading modern jurists who have contributed to the science of the conflict of laws. One misses from his pages, for example, any reference to Schäffner's 'Entwickelung des internationalen Privatrechts' (1841). He deals somewhat too briefly, moreover, with Mancini's famous 'Della nazionalità come fondamento del diritto delle genti,' and with jurists, such as Weiss and Laurent, who have adopted Mancini's teaching.

Dr. Bellot's main thesis emerges into the clear light of day in his final chapter. He holds that there are three principal doctrines relative to the conflict of laws—the *théorie statutaire*, the *théorie internationale*, and the *théorie territoriale*; and he holds further, be it observed, that no one of these three doctrines is exclusively Continental or exclusively Anglo-American. In his consideration of the *théorie statutaire*, which presupposes the existence of two independent juridical systems and the possibility of a choice between them, Dr. Bellot deals with the complication which results from the fact that, while England and the United States of America adhere to domicil as the criterion of the *statut personnel*, the principal States of the Continent have substituted nationality for domicil; and he holds that, while the principle of nationality is practicable for States which possess a single juridical system, it is impracticable in respect of States, such as the British Empire, the United States of America, Switzerland, and many South American Republics, where various and varied systems of law exist side by side under a single sovereignty. Nor is Dr. Bellot less instructive when he deals with the further complication that results from the *théorie statutaire*, namely, the doctrine of *renvoi* and its application. He draws attention to the fact that jurists who support the doctrine of *renvoi* limit the series of *renvois* in order to prevent it going on *ad infinitum*; and he agrees with Baty, Beale, and certain other jurists in rejecting the doctrine, approving the remark of Buzzati that *renvoi* is lawn tennis applied to private international law. Dr. Bellot also explains and criticizes the second and third principal doctrines. The second principal doctrine, the *théorie internationale*, presupposes the existence of a body of principles for the regulation of all juridical relations involving a foreign element; and this doctrine differs from the *théorie statutaire*,

which presupposes a number of juridical systems which are disputing for predominance, in that it causes a single system, an international system, to supplant all the laws that are in conflict with it. The third principal doctrine, known as the *théorie territoriale*, insists upon the absolute and exclusive supremacy of the law of the land over all persons and all things comprised within the territorial jurisdiction; and since this doctrine of sovereignty cannot be applied rigorously without entailing great injustice, its adherents have invoked several theories, notably those of *courtoisie* and acquired rights, to explain the application of foreign law by the territorial State.

Dr. Bellot has done much to clarify thought by proving that, while the jurists of the world are to be grouped into three distinct and different schools on the basis of three principal doctrines, no one of these doctrines can be said to be either Continental or Anglo-American; he shows us that each one of the principal doctrines is supported by a certain number of leading jurists both in Continental countries and in England and the United States of America. So far, then, as fundamentals are concerned, there is no such thing as a Continental doctrine and there is no such thing as an Anglo-American doctrine. If, Dr. Bellot concludes, he has not succeeded in presenting a doctrine of the conflict of laws generally admitted by Anglo-American countries, it is for the simple reason that no such doctrine exists. There is, however, as he observes, one important difference in principle between certain Continental countries and Japan on the one hand and Great Britain, the United States, and the Latin-American republics on the other hand, since the first group of states adhere to nationality as the criterion of the *statut personnel* and the second group apply domicil as the test. There are other differences between the Continental and the Anglo-American juridical systems, Dr. Bellot declares; but they are much more differences in method than differences in principle. These differences in method, such as the Anglo-American system of judicial precedents as contrasted with the codes of Continental countries, are not unimportant; but at the same time there are also many points in common between Continental and Anglo-American legal systems. Dr. Bellot justly maintains that, if the science of private international law, which is still in its beginnings, is to develop, it is essential to accentuate these common features instead of increasing the points in conflict.

H. D. H.

A Treatise on the Law of Prize. By C. John Colombos, LL.D., Barrister-at-Law, with an introductory chapter by A. Pearce Higgins, C.B.E., K.C., LL.D. The Grotius Society Publications. London: Sweet & Maxwell, Lim. 1926. 8vo. xxx and 384 pp. (15*s.* net.)

The British Prize Court has now practically concluded its labours, and Dr. Colombos' treatise appears at the appropriate moment. We can congratulate him on an admirable book, which will undoubtedly rank as a standard work on the subject. He has not confined his researches to the prize law as administered in this country, but has taken a complete survey of the more important decisions of the Prize Courts of all the belligerent countries in the Great War with the exception of Turkey. As regards the

United States no Prize Court sat in the late war, but the author deals fully with the earlier American decisions, particularly those arising out of the Civil War, which provided very useful precedents.

'International law, in order to be adequate as well as just, must have regard to the circumstances of the times': *The Kim* [1915] P. 213; and the conditions which prevailed in 1914-18 led to various developments from pre-existing principles, particularly in relation to contraband and the doctrine of continuous voyage. Dr. Colombos' chapter on contraband of war will make it plain to every reader how it was that the illogical application of the doctrine of continuous voyage to absolute contraband only (except in cases of countries without a seaboard), laid down in the untimely Declaration of London, could not stand the test of war. As Sir Samuel Evans said in his celebrated judgment in *The Kim* (*supra*): 'If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolute contraband, become contraband by reason of a further destination to the enemy government or armed forces?' When whole populations were more or less organized for war and supplies of all sorts were under Government control, it became immaterial whether goods were destined for the civilian population or the armed forces of the enemy; and gradually there ceased to be much distinction between absolute and conditional contraband.

By Art. 2 of the Declaration of Paris, 1856, the neutral flag covers enemy goods except contraband of war, and Dr. Colombos states that the British Prize Courts imposed a limitation, which he regards as unjustifiable in law, on the application of this Article in the case of a transfer of goods from an enemy to a neutral ship. He quotes as his authority for the limitation an alleged statement of Sir Samuel Evans in *The Jeanne* [1917] P. 8; 2 B. & C. P. C. 227, that in all cases where a change of goods from an enemy to a neutral vessel has been effected, and the goods had been seized on the neutral ship, they were not exempt from confiscation. The statement does not appear in these or in any similar words, and a careful study of the case shows that it is by no means a clear authority for the suggested limitation. It is important to notice that the cargo in any event was confiscable as contraband, consisting as it did of rice for enemy consignees, and it was condemned on this ground. Sir Samuel Evans also held on the facts that the neutral vessels into which the cargo had been transhipped after the German vessel had taken refuge in a neutral port were in the position of vehicles employed by the enemy agent who had chartered them, and that they were incorporated into the enemy service just as much as if the German ship had got nearer to port and had used these ships as lighters. In these circumstances, if protection had been sought under Art. 2, his Lordship said that he 'would have come to the conclusion that the Scandinavian vessels had so identified themselves with the enemy . . . that no protection was or could be given to them, or was ever intended to be given to them, under the Declaration of Paris.' This *obiter dictum*, particularly in view of the facts as found, does not appear to justify the wide interpretation put upon it.

The difficulties this country brought on itself at the outset of the war by adopting with modifications the unratified Declaration of London led to the issue of a bewildering succession of Orders in Council, in spite of the discouragement which such executive orders received at the hands of

the Privy Council in *The Zamora* [1916] 2 A. C. 77, where it was laid down that if a Prize Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its direction from the Crown, which is a party to the proceedings. The Court itself must determine what the law is and its view must prevail over any executive order; and both in *The Hakan* [1918] A. C. 148, and in *The Proton, ibid.* 578, the Privy Council refused to enforce provisions of the Declaration not in conformity with international law. In many countries, however, as the cases collected by the author clearly show, Prize Courts are bound by the executive orders of the authority under which they sit; and even in this country the Prize Court 'would certainly be bound by Acts of the Imperial Legislature' (*The Zamora*), and must accept from the Executive the recitals justifying reprisals: *The Leonora* [1919] A. C. 974. Dr. Colombos accordingly advocates that the adjudication of all international questions should be assigned to international Courts. He acknowledges that a scheme whereby the International Prize Court was a Court of first instance appears quite unworkable for the present, and his suggestion is that the questions involved, and not the actual judgment of the national Court, should be brought before the International Court under the form of a new trial and as a *de novo* procedure. The scheme has much to commend it, but we agree with Dr. Pearce Higgins, who has written the very interesting Introductory Chapter, that the time is not ripe for this question, discussed at many international conferences, to be reopened. 'After the experiences of the late war, in which it was found that most of the Hague Conventions and many of the provisions of the Declaration of London were impracticable, many States, and in particular Great Britain, will be slow to attach their signatures to similar attempts to lay down rigid rules.'

The Prize Court Rules, 1914, effected great changes in the form of the proceedings. Formerly the evidence on which a ship or cargo was condemned or released was derived exclusively from the ship's papers, but under the 1914 rules the captors support their case by any evidence in their possession. Sir Samuel Evans, in *The Antares* [1914] 1 B. & C. P. C. 261, refused to make any orders for the delivery of pleadings; but Dr. Colombos' observation that 'all prize cases were consequently tried without any written statement of the opposing parties' is only accurate if by 'written statement' he means petition and answer. Claimants invariably filed a formal claim setting out the grounds on which they sought the release of their property, and this was supported by affidavits stating the facts on which they relied. The Crown's case was likewise put on affidavit. The author refers also to several decisions of Sir Samuel Evans in support of the statement that 'it is not usual to condemn a neutral claimant in costs except under exceptional circumstances, viz. when he has attempted to put forward a false or unreasonable claim.' As time went on, however, the tendency increased to award costs against the claimant in most cases in which the Crown was successful, a practice which the earlier decisions justify on the assumption, not that there were exceptional circumstances, but that an unsuccessful claim generally means a false one.

Dr. Colombos comments adversely, as others have done, on the century-old rule of the British Prize Court that an alien enemy has no *locus standi in judicio*, mitigated though the strict rule was by the practice laid down in *The Möwe* [1915] P. 1, that wherever an alien enemy claimed protection under an International Convention he could come before the Court as

a claimant and argue his case. It is perhaps unfortunate that the Prize Court was unable to see its way definitely to abandon the rule, which is contrary to that recognized in nearly all other European States. But in practice it was more honoured in the breach than in the observance, and certainly no alien enemy suffered in consequence of it. Not only did enemy claimants appear to assert their rights under International Conventions, but they also appeared without objection to contest condemnation of their goods when shipped or carried under circumstances which they conceived gave immunity from capture—see *The Roumanian* [1916] 1 A. C. 124, and *The Hakan, supra.*

By the Naval Prize Act, 1918, part of the ancient jurisdiction of the High Court of Admiralty was transferred to a specially constituted tribunal —the Naval Prize Tribunal—for the decision of any question as to whether a sum resulting from the condemnation of a prize was a droit of the Crown, and so payable to the Naval Prize Fund, or a droit of Admiralty, and payable to the Exchequer. Dr. Colombos is in error, however, in stating that the Tribunal consisted of one lawyer and two naval officers. Lord Phillimore, the Chairman, sat with Sir Guy Fleetwood Wilson and one naval officer, the late Admiral of the Fleet Sir George Callaghan, and, at his death, Admiral of the Fleet Sir F. Doveton Sturdee was appointed.

A perusal of these pages brings out clearly how great was the work of Sir Samuel Evans and how he treated the precedents handed down from earlier times, and in particular from his great predecessor, Lord Stowell, as 'Guides to lead and not as shackles to bind.' We recommend every student of international law to read Dr. Colombos' work. It is clearly written and well arranged, and, had it been possible for the book to be available during the years when the Prize Courts were in almost daily session, no practitioner in them would have cared to be without it.

E. C. M. T.

Principles of the Law of Real Property. By the late Joshua Williams. Twenty-fourth edition, by R. A. Eastwood, LL.D. London: Sweet & Maxwell, Lim.; Toronto: The Carswell Co., Lim.; Sydney, Melbourne, Brisbane: The Law Book Co. of Australasia, Lim. 1926. 8vo. lvi and 906 pp. (30*s.* net.)

Like the waves on the seashore, the new editions of 'Williams' come ever onward; the only difference is that in consequence of the recent serious upheavals of the Statute Book consequent on the property legislation of 1925, this wave is rather larger than those immediately before it. The first thirteen editions were prepared by the author, while for the next ten his son, Mr. T. Cyprian Williams, was responsible. We regret that the latter is no longer directly connected with this valuable work; the present editor tells us, however, that he has had the advantage of the annotations of Mr. Cyprian Williams to a date shortly before the passing of the legislation of 1925.

It is clear that this edition has not been an easy one to do, but the work has fallen into capable hands, and on the whole, considering the short time available, the result is very satisfactory. The general framework remains:

the work has necessarily been built up on that, though, as will be seen, an important chapter on equitable estates and in particular on the Statute of Uses has disappeared. If this book is to remain, as it primarily was, a students' book, we think that in a future edition some of the omitted matter will have to be restored. It is difficult to see how the phrases 'equitable interests,' 'operate in equity,' and others that one meets in the new legislation of 1925, can otherwise be well explained. Maitland long ago described equity as necessarily an appendix to the law, but one may add that it is so important an appendix that there are times when the tail seems to waggle the dog rather than the dog the tail. At the same time, much historical matter has, we think rightly, been suppressed, for it is not primarily concerned with history. We doubt whether the interesting discussion in *Muggleton* v. *Barnett*, 2 H. & N. 652, need in the near future be retained in an Appendix.

The famous Table of Descents showing the ramifications of the family of Benjamin Brown has been retained, with a useful comparison showing the law (1) before 1926, and (2) after 1925, on one page. As regards the description of the legal changes introduced by the Inheritance Act, 1833, we are doubtful whether it was wise to keep the present tense throughout. The undiscerning student may not appreciate, if he does not look forward or backward, that these rules, though they are rules still to be known, are not the present rules, and that the new Administration Act has profoundly altered the canons of descent. No doubt it saves some trouble in editing, but it is a matter from the teachers' point of view worth considering.

The chapter on 'A Mortgage of Land' is specially good, and states the changes in the law with regard to tacking and other matters with singular clarity.

Part VII deals with the subject of 'Title,' and is necessarily brief. Having regard to the new so-called 'curtain provisions' of the new legislation, it seems that some of this part of the work will require re-statement. Part VIII concerns itself with the present form of a conveyance on sale, and also briefly alludes to the forms of mortgage and marriage settlement. This Part of the book is too briefly stated and should be reserved for a supplementary volume.

The subject of registered land is repellant to some minds, but it is no forgotten and is treated of in nearly fifty pages at the end. This is not the place to discuss that much-vexed question, but we think that the book should have included in an Appendix forms of transfer, of land certificate and land charge, and copies of typical entries in the various registers. Probably most students do not appreciate that a recrudescence of this controversy is likely to occur after the next ten years, for the new conveyancing now in operation is frankly on its trial; it is right, at all events, that this alternative system should be understood as far as possible. We have no hesitation in recommending this edition of a well-known book to the better class of students and even to practitioners at the Equity Bar, but it is now, we think, no longer what may be called a 'first book.' It will, however, easily hold its own with other books on the subject. Mr. Eastwood is to be congratulated on his efforts.

G. H. H.

Gibson's Conveyancing. Twelfth edition. By H. Gibson Rivington and A. Clifford Fountaine. London: The 'Law Notes' Publishing Offices, Chancery Lane, W.C.2. 1925. 8vo. xcvi and 752 pp. (21*s.* net.)

These well-known collaborators, who were so successful in dealing with 'Snell's Equity,' have manfully faced the difficulty at the end of 1925 of bringing out a new edition of this useful work. A new edition was called for, and it had to be done; we think the result is satisfactory. The student cannot learn too soon that a knowledge of the old law before 1926 is essential, and will be for many years to come: this point has not escaped the notice of the writers, and, as we should expect to find, much of the book is a restatement of the old law. Nevertheless, a brief survey of the new property statutes which we find at the beginning of the book is a useful feature, particularly in relation to the Land Charges Act, 1925. Only by practice and general experience can one hope to remember what claims or interests can or cannot be overreached by a conveyance to a 'purchaser' as defined by section 20. So far as this point is concerned, there seems, perhaps, little likelihood that the new powers of setting up a special trust for sale under the Law of Property Act, 1925, s. 2, or a special settlement under the Settled Land Act, 1925, s. 21, will be much resorted to; this view we see is confirmed on p. 33. The discussion of settlements and the Settled Land Act is remarkably good, and in fact we can recall no clearer exposition of the ordinary provisions; but, of course, the date of publication precludes the possibility of any reference to decided cases under the new Act, and we suppose that no prophetic instinct as to possible statutory modification of the rule in *Howe* v. *Earl of Dartmouth* was to be expected on p. 561. The rules of construction of a will (pp. 564—592) are useful, but we are still somewhat surprised to find them in a students' book, as we suppose this primarily to be. Conveyancing under the Land Registration Act, 1925, is dealt with in Book II, pp. 620—692. By the way, the idea of registration of title to land, as opposed to registration of assurances, is, we believe, older than the time of the late Mr. T. G. Fonnereau; and if we are to attach credence to the footnote on p. 400 in Parkes' 'History of the Court of Chancery (1828),' a book of great credit in its day, the statements on p. 620 in the book now under review must be corrected. We have hinted elsewhere in the review on Williams' 'Real Property' that the subject of registration has been shelved for a time. It is useful in very simple cases, but is not too adaptable in the harder ones. We have carefully perused the account of it in 'Gibson,' and think it quite adequate for the purpose. Primarily the book is for students working for the Solicitors' Final and not for the Bar, nor for University examinations; as regards these latter, however, they may very well read what is said on mortgages and settlements. The Index is full, but there lacks a comparative table such as one sees in Hugh Pollock's book on the Acts, showing the sections of the repealed Conveyancing Acts which correspond (where such correspondence exists) with the existing sections of the New Acts. It is easy, however, to be censorious, but in conclusion we can say that it has been a pleasure to read the book.

G. H. H.

Mews' Digest of English Case Law. Second edition. By Sir Alexander Wood-Renton, K.C.M.G., K.C., Sydney Edward Williams and Wyndham A. Bewes. Vols. XII. to XVII. Containing the titles 'Land Registry' to 'Sheriff' and Temporary Table of Cases covering Vols. I. to XI., 603 pp. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. and the Solicitors' Law Stationery Society, Lim. 1926. La. 8vo. xciv pp. and 9,900 columns. (35*s.* per vol.)

These seven volumes of the Digest contain many important titles, and with their publication the end is in sight.

Volumes XII. and XIII. contain three titles dealing with various aspects of Local Government. The longest of these is 'Local Government Outside the Metropolis,' and this is followed by 'London' and 'Municipal Corporations.' The cases on Highways, Poor Law Authorities and that ever fruitful subject of litigation Sewers and Drains are collected under their special titles, except that sewers and drains in the Metropolis form a sub-title of 'London.'

For some reason three cases on markets have crept into the title 'Local Government,' and another has found its way into the title 'London,' though these strays have no more connection with those titles than have many other market cases. The one market case digested under 'London' is a case on disturbance of the franchise rights of the City, but the City is not otherwise dealt with in this title.

Cases on 'Sales in Market Overt' are strangely scattered. One, as we have pointed out elsewhere, has found a resting place in the title 'Custom,' sub-title 'Market Overt, London,' and yet others are to be found, where perhaps they should all be, in the title on Sale of Goods. But there we miss some useful authorities such as *Crane* v. *London Dock Co.*, *Hill* v. *Smith*, *Ganly* v. *Ledwidge* and *Delaney* v. *Wallis*. The title 'Sale of Goods' would be the better for more careful arrangement. It might with advantage follow more closely the Sale of Goods Act, 1893. And we do not understand why *Behn* v. *Burness* and *Watkyns* v. *Rymill* are treated as cases of 'Implied Conditions and Warranties.' The first of these is a leading case on express conditions in charterparties and the second a well-known authority on the incorporation of printed conditions into a contract made without express reference to them. It has not much to do with the sale of goods.

The title 'Nuisance' in Vol. XIV. also might have been better arranged. Under the sub-title 'Nuisance—What amounts to' there is a miscellaneous collection of authorities, some deciding what may constitute an actionable private nuisance, and others what may constitute a public nuisance, whilst yet others are cases of nuisances and 'noxious businesses' under the Public Health Acts. This collection would be much more useful if the authorities were classified and arranged.

Chitty's Statutes. Sixth edition, Vol. 24. Edited by W. H. Aggs, M.A., LL.M. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1926. La. 8vo. xxxvi and 948 pp. (£1 10*s.* net.)

The twenty-fourth volume of 'Chitty's Annual Statutes' and the second volume issued for the year 1925 follows the usual lines of this well-known publication, and contains all the statutes of practical utility passed during the year 1925 other than those half-dozen enactments comprehensively termed the 'New Property Acts,' which for convenience were collected in a separate volume and published earlier in the year as Volume 23 of the series.

A work like the one under review is of course, of greater use when Amending, Consolidating or Codifying Acts are being dealt with than when fresh legislation, particularly of the administrative type, is in question. In the latter case the editor can, as a rule, do little more than reprint the statute, but in the former cases it is his peculiar province to correlate with the existing body of statute law the items of legislative amendment, and, by his annotations and references to the existing mass of case law, fill in the outlines provided by Codifying and Consolidating Acts. The year 1925 was unusually rich in such opportunities, for in addition to the passing of the series of Real Property Statutes the year was marked by a series of important Consolidating Acts in such diverse departments as Housing, Judicature, Workmen's Compensation, and Town Planning. These and such amending Acts as the Criminal Justice Act, 1925, the Guardianship of Infants Act, 1925, the Public Health Act, 1925, and the Rating and Valuation Act, 1925, offered great scope to such a publication as 'Chitty's Statutes,' and called for much labour if an adequate apparatus of notes and cross-references was to be provided. The task has been most ably discharged by the learned editor and his collaborators, and discharged with dispatch, so that before the Long Vacation practitioners had to hand in two manageable volumes a key to the whole of the vast legislative changes of 1925.

While every Act received due treatment, especial mention may be made of the annotation of the Workmen's Compensation Act, 1925. All the important decisions on the earlier Workmen's Compensation Acts find a place, and the main principles are illustrated in detail. A fuller note perhaps, might have been accorded to section 1, sub-section 2 of this Act, which re-enacts the provisions of section 7 of the 1923 Act. There has been already a considerable amount of litigation on section 7, bearing out the description of it by Atkin L.J. in *Davies* v. *The Gwauncaegurwen Colliery* as 'a gilt-edged section for the legal profession.' The litigation on it reached its culmination in the recent House of Lords cases of *Wilsons & Clyde Coal Co.* v. *McFerrin*, and *Kerr* (or *McAuley*) v. *James Dunlop & Co.* [1926] A. C. 377, cases which find no place in the notes, probably because they appeared in the reports too late for notice of them to be given. These and the decisions on the section in the Court of Appeal have shown that the scope of the section is much less than it was thought in some quarters to be, and for that very reason the section bristles with difficulties which remain to be cleared up. Indeed, it is not by any means clear, having regard to the language of Scrutton L.J. in *Borby* v. *Ockenden* [1925] 2 K. B. at p. 336, that the old and much litigated distinction

The Law of Building and Engineering Contracts. Fifth edition. By A. A. Tillotson, K.C., assisted by Lawrence Wilkie, B.A. London: Sweet & Maxwell Ltd. [illegible] 8vo. xxvi and 338 pp. 42s. net.

A new edition of this important work has been published at a single volume. The previous edition, issued in 1914, was divided into two volumes, the second of which comprised precedents, forms and reports of cases, and it is the practice which the author in the preface states that it has not been necessary either to revise or reprint but should be retained as an appendix to the new volume.

A more extended consideration of the subject-matter might have seemed to be the chief function of the present volume and the increased practice of litigation in connection with building contracts has undoubtedly augmented the work. For some years Mr. Tillotson's book on building contracts has been a comprehensive survey of the leading cases on the law and it has been essential not only to keep pace with the decisions but to interpret as well. In fact, when originally written the author was able to have advantage of the practical experience of an architect and surveyor, which perhaps is some measure explains the reason why the work is largely consulted by members of those professions.

The considerable amount of building work in progress at the present time and the many questions which may arise as to the position of the architect, engineer, building owner and builder, make it all the more necessary for the practitioner to be able to find an up-to-date exposition of the law. In particular, we notice that the duties of architects and engineers in issuing certificates has received fuller consideration, and a chapter (xiv.) is devoted to "Assignment of Benefits, Moneys or Insurances," which is of much interest and importance in view of the conditions existing between builders and the companies or private investors on their contracts or claims with employers.

The book is an authoritative and reliable exposition of the present law and as written is a practical guide for persons interested in building contracts as well as those engaged in the law.

W. E. G.

The Journal of The Society of Public Teachers of Law, 1926. Edited by H. F. Jolowicz, M.A., LL.M. London: Butterworth & Co. 64 pp. (3*s*. 6*d*. net.)

The editor is to be congratulated on a number of exceptional interest. The four leading articles are by Professor Brierly of Oxford, Dean Wigmore of Northwestern University, Chicago, Mr. E. C. S. Wade, Principal of the Law Society's School of Law, and the editor.

Professor Brierly deals with International Law as a subject of education. He emphasises that International Law is of ever-growing importance at the present time. The war in 1914 has not shown, as some writers claim, that it has failed. 'It is, for instance, as absurd to blame International Law for not having rendered impossible the outbreak of war in 1914, as it would be to blame our national systems of law for the civil war in Ireland.' We must judge International Law by its solid achievments and not by the distance by which its success has fallen short of its self-imposed aims. In studying International Law we must not only expound it as it is, but also consider its aims and shortcomings. It is this attitude of critical enquiry which makes the subject a particularly valuable one for educational purposes. Because of the close affinity between International Law and other social subjects, the essential connection between law and ethics and politics is emphasised, as it need not be in other more strictly legal branches. Perhaps Professor Brierly's most interesting point is that International Law is of particular interest to the jurist for it offers for examination 'an essentially customary system of law actually in operation.'

Dean Wigmore suggests a new way of teaching comparative law which would make the subject amusing as well as instructive. Merely comparing certain individual rules is of slight value and is apt to prove misleading. Adequately to compare two legal systems would be a task for a great scholar's lifetime. 'If it (comparative law) is to play any part at all, then, why not sketch it broadly, on impressionistic lines, but make that impression as deep and significant as possible? A brief printed text, however cleverly constructed, is bound to be dry. Mere words are unreal. Why not try pictures?' To illustrate his suggested method he appends an outline of the Egyptian legal system, which is a model of lucidity and compression. Only the photographs are missing.

Mr. Wade discusses the achievments and difficulties of the Law Society's School of Law. The remarkable success of this institution in recent years is one of the important events in twentieth century legal education. Of particular interest is his discussion of the separation between teaching and examining. 'So strict is the separation that no member of the Staff of the School or of the provincial law schools approved by the Society for the purpose of the statutory attendance can be appointed an examiner. No recommendation can be made by the Staff direct to this committee. While it is appreciated that the object of this divorce of teaching from examinations is to preserve the practical element in the latter, it is certainly true that the educational work of the school is hampered by the restrictions which such a system imposes.'

Mr. Jolowicz, the All Souls Reader in Roman Law, in dealing with the teaching of Roman Law stresses the importance of making the student study an original text. 'The man who has to know a text has a definite task to

master; he must look closely at the words used and can be held to blame if he lets any passage pass without making up his mind that he understands it; the attitude of mind required is different from that needed in reading a text-book, for it often includes criticism as well as comprehension.' If the field of study is not sufficiently limited then 'the study of Roman Law tends to degenerate into the "cramming" of short and generally inferior text-books.'

Valuable notes by Professor Raleigh Batt of Liverpool University and Mr. Harold Potter of Birmingham University are included. The book reviews are, as always in this Journal, contributions to legal learning.

Acts of the Privy Council of England, 1615—1616. London: Published by H.M. Stationery Office. 1925. La. 8vo. 774 pp. (21*s.* net.)

Few persons would go to a volume of official records of subdued appearance in search of entertainment, and yet this book contains a fund of interesting facts, historical and personal, the affairs of the individual being sandwiched in with affairs of State. On the same page we find the issue of a mere licence to travel—'a passe for William Hart, gent, to goe into Germany for some convenient time,' and the text of an important diplomatic document, a letter to 'Sir Thomas Edmondes, his [Majesty's] Embassador resident with the sayd Frenche King," complaining that the Governor of Dieppe had 'insolently and violentlie seized upon a shipp and goods belonging to his Majestie's subjectes, lying in the roade of Diepe, without all forme of justice,' and instructing our ambassador to 'demaund speedie and severe justice for the insolencie of the Gouvernor of Diepe, who hath had the presumption to be his owne executioner upon our subjectes, contrarie to the lawes of humane reason.' The demand appears to have been quite effective and the offending Governor was forced to make amends.

On another page an affair of petty cash, an order for the payment of £5 to the Keeper of the Council Chest 'his man . . . for makinge of pennes for the use of the Table and other services,' is followed by a serious complaint as to danger to the safety of the realm caused by scarcity of gunpowder, a previous letter to the Lord Mayor and Aldermen of the City of London stating that 'there is scarce match and powder in the whole citty to serve on dayes trayninge,' the reason for this scarcity being that a monopoly for the making of saltpetre had been granted by letters patent to 'our very good Lord, the Lord Privy Seale.' Whether my Lord had deliberately restricted the output in order to raise prices after the manner of modern combines does not appear.

An important stage in Coke's long quarrel with the King is recorded on pp. 644—650. On June 26, 1616, the Chief Justice presented himself 'on his knee at the Boarde.' Charges were formulated and Coke's defence was not accepted, his Majesty being 'much unsatisfyed.' The decree pronounced sequestered Coke from the Council Table and forbade him 'to ryde this Sommer's circuit as Justice of Assize.' He was also ordered 'to take into consideracion and review his bookes of Reportes wherein (as his Majestie is

informed) there be many exorbitaunt and extravagant opinions sett doune and published for positive and good lawe.' There is also a record of the King's displeasure that Coke had styled himself Chief Justice of England on the title of his books, 'whereas hee could challendge noe more then chiefe Justice of the Kinges Bench.'

Extradition of offenders from Scotland and Ireland was apparently no easy matter, for on February 19, 1616, a letter was sent to the Earl of Cumberland and Lord Walden, 'His Majesty's Leiuetenantes of the Middle Sheires,' concerning the great increase of robberies and other crimes and the escape of the perpetrators into Scotland and Ireland.

Due consideration was given to the grievances of the common people. On May 31, 1616, a complaint from Tiverton was considered. 'Some owners of land upon the river of Ex lesse charitable (it seems) then becomes them, who refuse to permitt passage unto labourers coming upon their groundes for the guyding of wood and timber in the sayd river from a Wood called Wonham Wood, about six miles from the towne, for the re-edifying of their howses, being twise lamentably consumed with fyer.' Their Lordships could not conceive 'that the liberty which is desired, tending to the publick good . . . would be denyed by any man of reckoning or reputation, but by suche only as preferred their owne privat benefitt before any other respectes and take this advantage to raise it out of the pressing necessityes of others.' The Earl of Bath, the Lord-Lieutenant of the county, was enjoined to deal with the offending landowners, and if they proved too stubborn, to bring them before the Privy Council.

Another unimportant item of human interest is an order to pay 'Walter Meeke, his Majesty's barber, the summe of one hundred and nine poundes, for divers necessaries provyded by him for his Majesty's use, for one yeare, beginninge in July, 1614, and endinge in July, 1615.' Converted into modern currency, this would make a pretty bill.

On June 5, 1616, Sir Arthur Ingram and Sir John Gibson were granted a pass 'to repaire to the spawe in Germany to make tryall of that water for recovery of their healthes and to take with them foure men and such trunckes of apparrell and other provisions.' Indeed, many such passes for travel appear up and down the pages of the volume, and a very usual condition attached was a prohibition against going to Rome. We note that one cause was appointed to be heard 'at nyne a clocke in the forenoone'—a tribute to the energy with which my Lords conducted public business in the seventeenth century.

The text of this interesting volume is printed under the supervision of Mr. E. G. Atkinson and Mr. J. V. Lyle, both of the Public Record Office.

Gibson and Weldon's Student's Criminal and Magisterial Law. Eighth edition. By Arthur Weldon and A. Clifford Fountaine. London: The 'Law Notes' Publishing Offices. 1926. La. 8vo. lxvii and 398 pp. (21*s.* net.)

The Criminal Law. A Sketch of its Principles and Practice. By Henry W. Disney. Second edition. London: Stevens & Sons, Lim. 1926. 8vo. xxxii and 284 pp. (10*s.* net.)

Gibson and Weldon's book is an accurate and imposing criminal law text-book. Its style is too concise to be easy to read, and it is somewhat too prone to become a statement of rules and too loth to concern itself with discussion of theory. It is, however, an exhaustive and competent work, well adapted to the use of articled clerks and Justices of the Peace. The matter is well arranged for the purposes of practice and the language unambiguous, though we take exception, *e.g.*, to a paragraph at p. 14, which commences: 'The duress or pressure of necessity would not seem to be any justification for a crime,' which cites for this proposition *R.* v. *Stratton* (21 St. Trials, 1045), a case in which necessity was held to excuse the crime charged, and then cites *R.* v. *Dudley*, and ends (with reference to the latter case), 'but it was not decided that in no case would necessity ever justify homicide.'

The late Mr. Disney, the Stipendiary Magistrate, left unfinished this second edition of his book, first published in 1895, and it has been completed and revised by Mr. Lieck, the learned Clerk of the Marlborough Street Police Court. It is, as the name suggests, a somewhat slender work of which the chief merits are lucidity, simplicity of language, and an easy, popular and conversational style that makes the reading of it extraordinarily easy and even charming. Its faults are mostly in its plan, in that it seeks to tell a little of all offences known to the law, and, secondly, in its execution, in that it contains here and there careless language and several misstatements of the law. In the case of a person found guilty of being an habitual criminal the Court has no power to 'sentence him, after undergoing a term of penal servitude, to be kept in detention for a period of, &c.' (p. 30). It is an understatement to say that 'if a prisoner is undefended it is unusual for the prosecuting counsel to make a second speech to the jury' (p. 81). Counsel has no right to make a second speech in those circumstances: *Rex* v. *Thomas*, 17 C. A. R. 34. The case of *Rex* v. *Dudley* (14 Q. B. D. 273) does not decide that 'necessity or compulsion of circumstances, which induce a person to commit a criminal act as the choice of evils, or to avoid death or injury to himself, is no excuse in law' (p. 15), nor, in our opinion, does that proposition accurately state the law. Nor do we think it true to say that 'there can be no *mens rea* in a corporation' (p. 14).

A. S. D.

Projet de Code de Droit International Privé, par Antonio Sanchez de Bustamante y Sirven. Translated from the Spanish by Paul Goulé. Paris: Société Anonyme du Recueil Sirey. 1925. 280 pp. (15 fcs.)

To most students of International Law it will seem that the author has set himself an impossible task, at least if one is to judge by the comprehensiveness of the title and the short compass of the book as compared with English works like Dicey's Conflict of Laws which, in a much bigger volume, only profess to deal with Private International Law as practised in England. It is not surprising, therefore, that he has failed, although he has saved a good deal of space by refraining from giving any reasons for the wording of the articles of his draft Code except such as may be gathered from a very obscure introduction. That introduction, however, does serve the purpose of extolling the efforts of the Institut de Droit International of which the author is a vice-president. The draft Code certainly does not solve any of the well-known conflicts in international law, *e.g.* the perennial conflict between the *ius soli* and the *ius sanguinis* in nationality questions. To enact (*vide* Article 12) that any question as to the acquisition of a new nationality is governed by the law of the new nationality supposed to be acquired is as temptingly simple as cutting through a Gordian knot with a sword. But the ends may be tied together again by Article 14, under which the loss of nationality is governed by the law of the nationality so lost. Thus, the law of the adopted state governs one aspect and the law of the renounced state another aspect of the same naturalization process and the conflict is perpetuated, both states probably claiming the person concerned as one of their nationals. In regard to another old conflict, *viz.* whether the law of the domicil or the national law constitutes the 'personal law,' a point so ably dealt with by the late Professor Dicey, it is impossible to make out what Mr. de Bustamante means, and when he attempts to apply the principle of personal law to companies and bodies corporate, the result is the negation of all common sense. Thus, in Article 33 it is stated that juristic personality and its fundamental rights, *i.e.* the existence or recognition of corporate bodies, are to be governed by the personal law. How a supposed corporate body whose very existence is the matter in dispute and which may turn out to have no separate existence at all can have a 'personal' law is not explained.

Passing to another subject, it may be mentioned that the author introduces a double standard of 'ordre public' or morality. One kind is 'interne' (Anglice 'municipal'?) and the other 'international.' What is to happen, one may ask, if a champertous agreement was submitted to an English Court and it was urged that it was made in France and was not contrary to public policy under French law because not made with an officer of the Court? Which standard ought to prevail? In divorce questions the author admits the jurisdiction of the Courts of the matrimonial domicil (Article 50), but in the next breath (Article 51) refuses to recognize that jurisdiction if exercised on grounds which do not happen to be the same as those upon which it would be exercised according to the personal law of the parties. He does not see that once you admit a foreign Court's jurisdiction any attempt to dictate grounds for

its exercise is a denial of that jurisdiction. Just to mention one other subject, in questions of evidence, he would apply the *lex loci actus*, *e.g.* the law of the place where a contract was made instead of that very simple principle that every forum must regulate its own procedure and admit such modes of adducing proof as it may deem proper (*lex fori*). According to the author, apparently, if proceedings were brought in England on a contract made abroad, our very efficient system of examination and cross-examination would be inadmissible. The parties best able to explain the circumstances of the case would not be heard and instead the English Court would be treated or subjected to a long grandiloquent speech in the best Continental manner. In short, it is not very clear why this book came to be written nor what useful purpose it will serve, but it will no doubt provide rough material for harmless, if pedagogical, discussion by the members of the Institute of International Law.

A. C. W.

Law of Principal and Surety. Second edition. By John Rowlatt. London: Sweet & Maxwell, Lim. 1926. liii and 347 pp. (£1 2*s*. 6*d*. net.)

This is the second edition of the book originally written by Mr. Justice Rowlatt but, as pointed out in the preface, the learned judge has had no part in the preparation of the new edition. We agree with what the original author said in the preface to the first edition, that the law of principal and surety is one which both from a practical and theoretical point of view justifies separate treatment. It presents problems which cannot be solved merely by reference to the general law of contract. In our view it is essential that this branch of the law should be adequately dealt with in a treatise of its own. With all respect, we unhesitatingly say that the present edition worthily maintains the excellence of its predecessor. The book has been brought thoroughly up to date, such alterations, additions and omissions having been made as were necessary or desirable. The size of the book has not required any modification. We are of opinion that this treatise should find a place in the library of every legal practitioner. There is a table of cases and a good index.

L. W. J. C.

Willis' Workmen's Compensation. Twenty-fourth edition. By W. Addington Willis. London: Butterworth & Co. and Shaw & Sons, Lim. 8vo. c, 651 and 74 pp. (15*s*. net.)

The Workmen's Compensation Act, 1925, with notes, rules, orders and regulations, by W. Addington Willis, is the twenty-fourth edition of the learned author's 'Workmen's Compensation Acts,' and has been compiled with his habitual care and thoroughness. It is particularly appropriate to employ the epithet 'habitual' in this connection, as the various Acts on compensation for injured workmen and the cases decided thereon have necessitated a fresh edition almost annually ever since the principle of this kind of compensation first obtained legislative sanction in the year 1897. In the thirty years which have elapsed since that date the number

of authorities which have accumulated is immense, but Mr. Willis seems in every way adequately to have kept pace with the output. It is obviously a great convenience to have a codifying Act in place of those previously existing, and Mr. Willis' notes and comments are of the highest value to all who practice in this branch of law. The book is a veritable encyclopædia upon the subject. It is difficult to add any further word of praise for a treatise which has reached its twenty-fourth edition. This fact speaks for itself. Suffice it to say that whilst the arrangement of the 1925 Act is a great improvement on that of the principal Act of 1906, in that most of the provisions which were formerly contained in schedules are now embodied in the enacting sections of the statute, one result of this is, that practitioners would at first doubtless have some difficulty in finding their way about, but this book of Mr. Willis overcomes this difficulty and restores old landmarks by providing a comparative table of the present and the corresponding provisions of the repealed statutes or sections of statutes, and by placing after each section or group of sections in the text a paragraph calling attention to the repealed provisions corresponding to these sections. These are among the most useful features of the new edition. The cases in the notes are those which have been reported down to March 31, 1926, and the Consolidated Workmen's Compensation Rules, 1926, dated April 28, are also included. We heartily recommend Mr. Willis' book to all who are interested in this branch of our law. L. W. J. C.

The Conveyancer's Notebook. By A. H. Cosway. London: Effingham Wilson. 1926. 8vo. 196 pp. (5*s.* net.)

This is a well-produced book, printing paper and binding are excellent. The work is likely to be a useful addition to the perhaps already over-laden and ever-increasing literature bearing wholly or partially on the new Acts. The Author confines himself to writing a set of notes mainly on those points of law and practice which are likely to present themselves in the everyday experience of a conveyancing lawyer. Being confessedly a 'Notebook' only, we do not expect to find the academic diction and strict grammatical accuracy of expression which should characterise a legal textbook.

Particularly valuable are the portions dealing with Strict Settlements, application of Capital Money and the respective powers of a tenant for life and Settled Land Trustees. The new law relating to tenants in common and joint tenants, mortgages, intestacies, wills and administration, is clearly stated and will be distinctly helpful. There is also a set of addenda comprising several important cases decided during 1926 on the new Acts; the principal alterations made by the Law of Property (Amendment) Act, 1926; and further articles on the powers of personal representatives, etc.

A few errors have escaped the proof-reader's scrutiny, *e.g.* on page 4 the distribution under the old law of an intestate's *cash* is incorrectly stated; on page 19 the word *supra* is used when obviously *infra* is intended; on page 147 Law of Property Act, *1926*, is printed for 1925; on page 173 *Estate* appears for Estates. Future editions or reprints of this work will doubtless remove these unimportant defects in what is a thoroughly good production. R. B. H.

Rayden's Practice and Law in the Divorce Division of the High Court of Justice and on Appeal Therefrom. Second edition. By Clifford Mortimer, Barrister-at-Law, &c., and C. T. A. Wilkinson, of the Probate and Divorce Registry. London: Butterworth & Co. 1926. cix, 573 and 94 pp. (£2 2*s.* net.)

It is a long time ago now since 1910, and that was the year in which the first edition of this indispensable work was first published. Many important cases in the law of divorce have been decided by the Courts since 1910. This and other circumstances demanded a second edition of a book now considerably overdue. However, we are glad to see it at last, and the Digests—or, rather, those portions of them which summarize Divorce Court law—may be left to themselves if practitioners avail themselves of the opportunity now presented to them of possessing this excellent work.

The Matrimonial Causes Act of 1923 placed, as we all know, the two sexes on an equal footing as regards the grounds upon which divorce may be obtained, and granted relief to a wife whose husband had been proved to have committed adultery. Then, again, the Supreme Court of Judicature (Consolidation) Act, 1925, which came into effect on January 1, 1926, has codified all the statute law and new Rules, which came into operation on February 14, 1924. The Royal Commission made certain recommendations and suggestions as to proceedings *in formâ pauperis*, and these have been given effect to; and the Poor Persons Relief Rules have enabled poor persons to get free from the bonds of matrimony by employing counsel and solicitors whom they do not pay. The Administration of Justice Act of 1920 provides that certain specifically designated classes of cases can be heard at the Assizes, when the Judges are on circuit. The saving of money to such litigants in the shape of their own and witnesses' travelling to and hotel expenses in London is very great. Then there were the Rules of the Supreme Court (Poor Persons), 1925, which came into operation on April 6, 1926. After the Matrimonial Causes Act of 1857 had been passed, rules were laid down, and formulated, for the exercise of the discretion vested in the Judge, where the husband or wife has been guilty of adultery, and granting or refusing a decree *nisi* of divorce to a petitioner in such circumstances. This discretion was restricted within narrow limits, until the President delivered his well-known judgment in the case of *Wilson* v. *Wilson* [1920] P. 20, showing that the principle of 'doing unto others as you would be done by,' was by no means a bad guide to conduct in life, and was quite consistent with sexual morality. A co-respondent may be condemned in costs at the discretion of the Judge: and modern customs have crept into Divorce Court practice to the effect that he, or she, now often is. The hardship of the rule, for long inexorable, that a mother guilty of adultery must, for all time, be barred from access to her child, or children, was finally driven out of Court as cruel, hard, and unconscionable by the recent decision of the Court of Appeal in *B.* v. *B.* [1924] P. 176. We cannot agree with the learned editors when they say that the decision of the House of Lords in *Russell* v. *Russell* [1923] A. C. 309 is a retrograde change in the law. In that case, the House of Lords decided to exclude any evidence by the spouses in a matrimonial cause of divorce which would show, or tend to show, that there was a possibility of access between them, when a child was born to the mother, a party

to the action of divorce. The changes both in almost every branch of the law and practice of divorce have been so considerable and varied since the date of the first edition that a large part of the book has had to be re-cast, and re-written. Chapter II, on Relief, and Chapter IV, on the Institution and Defence of Proceedings—a most valuable help and a practical guide to all solicitors—come within this description. There is a good Table of Contents; an excellent Table of Statutes, which gives first the year of the reign and the 'caput,' then in the next column the title of the Act, and in the third column the page in the work in which each Act is to be found or referred to. This arrangement is wholly admirable, and we recommend its adoption by other authors. There are two Tables of Rules: (1) Divorce Rules, and (2) Other Rules. The Table of Cases covers sixty-five pages; there is a helpful Table of Abbreviations, and five most useful Appendices: (1) Statutes; (2) Rules; (3) Forms and Precedents—highly to be commended; (4) Fees; and (5) Costs. Whereas the first edition, we observe, covered only 500 pages, the new edition runs to 776 pages. This second edition of 'Rayden on Divorce, &c.' should soon find its way into most solicitors' offices and into the chambers of many barristers in the Temple. The work reflects the greatest credit on the two learned editors. G. L. A. S.

The International Law of Jurisdiction in England and Scotland. By Andrew Dewar Gibb, LL.B., &c., late Faulds Fellow in Law, University of Glasgow. Edinburgh: William Hodge & Co., Lim. London: Sweet & Maxwell, Lim. 1926. xxiv and 301 pp. (£1 1*s.* net.)

Any law work which deals simultaneously, especially in one volume, with the respective laws of England and of Scotland, and on one subject, is doubly welcome, and is almost certain to attract, as this book deserves to, the notice of the legal profession, as well as, indeed, of the law students at our Universities. The author of this work is the Faulds Fellow in Law of the University of Glasgow, and has tackled the difficult question of the International Law of Jurisdiction in these countries in an able way. Jurisdiction is unquestionably a very important, and, indeed, intricate branch of what the late Sir Erskine Holland liked to call International Private Law, which old-time lawyers will recognize as a synonymous phrase for Private International Law. The work covers the wide field of jurisdiction in both countries.

The book consists of a Table of Cases, eighteen chapters, one of which is an Introductory Chapter, and an Index. The Introductory Chapter is a model of what such a chapter should be. The authorities there cited by the learned author are, almost without exception, of the greatest importance, and of the highest authority. For example, the well-known case of *Porter* v. *Freudenberg* [1915] 1 K. B. 857 on p. 7, and a passage from Lord Reading's judgment, is duly cited therein; and in the Scottish case in the House of Lords, on pp. 8 and 9—*Ferguson & Co.* v. *Brown and Tawse* (1918) Sess. Cas. (H. L.) 125, followed in *Brown* v. *Willock, Reid & Co.*, 55 S. L. R. 744; and in *Davis and Primrose* v. *Clyde Shipbuilding Co.*, 56 S. L. R. 24—the learned author has inadvertently, on p. 9, transposed these cases. Alas! that that excellent series of weekly Reports came to an end a few years ago.

Another House of Lords case properly appears on the same page (9)—namely, *Rodriguez* v. *Speyer Brothers* [1919] A. C. 59—where their Lordships decided that it was allowable for an enemy to be joined as plaintiff in an action brought by the late members of a partnership to facilitate winding-up proceedings. Many practitioners, and some students, know *Mighell* v. *The Sultan of Johore* [1894] 1 Q. B. 149, where Mr. Justice Wills' judgment at pp. 149 and 153 is cited at p. 10; *Musurus Bey* v. *Gadban* [1894] 2 Q. B. 352; *Magdalena Steamship Co.* v. *Martin*, 28 L. J. Q. B. 310, and many other equally important and interesting cases of high authority are duly cited, in support of the learned author's propositions in law, in this excellent Introductory Chapter. At p. 99 the author does not hesitate to criticise the *dictum* of Lord Johnston, one of the three Judges of the First Division of the Court of Session, in *Ruthven* v. *Ruthven*, 43 S. L. R. 11. Is this case, by the way, not reported in the official Reports—the Session Cases? In *Montgomery* v. *Zarifi* (1917) Sess. Cas. 627, which was a case where a Scottish husband, who had divorced an English wife, subsequently brought an action of declarator, that his late wife had forfeited certain provisions under a marriage settlement; and he quotes a passage from the then Lord President's (Lord Strathclyde) judgment at the top of p. 177.

The book, as a whole, has been very well done; and the chapters on 'Jurisdiction in English and Scottish Suits *In Rem* (Admiralty Actions),' 'Jurisdiction in Bankruptcy in England and Scotland,' 'Jurisdiction in Divorce (England and Scotland),' 'Jurisdiction Constituted by Submission (England and Scotland),' 'The Plea of *Forum Non Conveniens* (England and Scotland),' and, lastly, 'Recognition of Foreign Judgments by English and Scottish Courts,' are all specially excellent, and indeed scholarly, contributions to their respective subjects. If the Index is very sketchy, the Table of Cases is very full, and very good. Altogether, the learned author has produced a most workmanlike book on a subject of great importance, and interest. G. L. A. S.

Books also received:—

A Digest of Cases decided in the Sheriff Courts of Scotland, and reported in The Sheriff Court Reports, 1915—1924. Vols. XXXI. to XL. Compiled by R. H. Sherwood Calver, Advocate. Edinburgh and Glasgow: William Hodge & Co., Lim. 1926. 251 pp. (21*s*. net.)—This Digest, although a little belated—it ends with the year 1924, being the fortieth volume of the Sheriff Court Reports—is an eminently useful and handy volume for officials of the Sheriff Courts, Sheriffs, Sheriffs-Substitutes, and the voluminous number of solicitors all over Scotland whose business takes them to the County Courts of Scotland. As over four years of the period covered by the present Digest include important years of the War, the number of cases in the Sheriff Courts is, relatively speaking, nothing like as great as they would have been in normal years. The work appears to have been carried out with attention and care. The references to the cases are to the volume and page of the Sheriff Court Reports. There are also sub-heads, and this is a practical feature of the work; but its value would have been considerably enhanced if cross-references had been made between sub-heads; for a case digested under one sub-head may be, and often is, appropriate to another sub-head. The book is well printed, and excellently got up. G. L. A. S.

Prideaux's Forms and Precedents in Conveyancing. Twenty-second edition. By Sir B. L. Cherry, LL.B., and John Robert Perceval Maxwell. Three vols. Vol. III. (Settlements, Wills, Assents, New Trustees, Leases, etc.). London: Stevens & Sons, Lim. Solicitors' Law Stationery Society, Lim. 1926. La. 8vo. cxlviii and 1390 pp. (£6 6*s.* net the three vols.)

Encyclopædia of the Laws of Scotland. Consultative Editor: Rt. Hon. Viscount Dunedin. General Editor: John L. Wark, K.C. Asst. Editor: A. L. Black, K.C. Vol. I.: Absolute Disposition to Arrestment. Edinburgh: W. Green & Son, Lim. 1926. La. 8vo. liv & 566 pp. (£2 17*s.* 6*d.* each vol.)

Elliott on Workmen's Compensation. Ninth edition. By Montague Berryman. London: Sweet & Maxwell, Lim. 1926. La. 8vo. xxxviii and 792 pp. (£2 2*s.* net.)

An Introduction to the Law and Tradition of Medical Practice. By William Sanderson, M.A., LLB., and E. B. A. Rayner, B.A., LL.B., Barristers-at-Law. London: H. K. Lewis & Co., Lim. 1926. La 8vo. xvi and 77 pp. (7*s.* 6*d.* net.)

Welsh Tribal Law and Custom in the Middle Ages. By T. P. Ellis, M.A., F.R.Hist.S. Two volumes. Oxford: At the Clarendon Press. 1926. 8vo. xiv, 456 and 460 pp. (£4 net.)

The Modern State. By R. M. MacIver. Oxford: At the Clarendon Press. 1926. 8vo. xii and 504 pp. (21*s.* net.)

The Rating and Valuation Act, 1925. By Herbert Davey. London: Stevens & Sons, Lim. 1926. 8vo. xxvii and 464 pp. (25*s.* net.)

Powers of and Applications to the Court under the New Property Acts. By E. Riviere. London: Stevens & Sons, Lim. 1926. 8vo. vii and 140 pp. (6*s.* net.)

Introduction to the Study of Public Administration. By Leonard D. White, Ph.D., Professor of Political Science in the University of Chicago. New York: The Macmillan Company. 1926. 8vo. xiii and 495 pp. (14*s.* net.)

Historical Notes on the Use of the Great Seal of England. By Sir H. C. Maxwell-Lyte, K.C.B. London: H.M. Stationery Office. 1926. La. 8vo. ix and 460 pp. (18*s.* net.)

Privy Council Practice. By Norman Bentwich. Second edition. London: Sweet & Maxwell, Lim. 1926. 8vo. xxxi and 416 pp. (35*s.* net.)

Whitaker's Almanack, 1927. Complete edition. clxxxiii and 896 pp. (6*s.* net.) Abridged edition. clxxxiv and 240 pp. (1*s.* 6*d.* net.) London: J. Whitaker & Sons, Lim.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

Books for review should be sent to the care of the Publishers. All other editorial communications should be addressed to Mr. A. L. Goodhart, 13 Old Square, Lincoln's Inn, W.C.2.

THE

LAW QUARTERLY REVIEW.

No. CLXX. April, 1927.

NOTES.

Cummins v. *Bond* [1927] 1 Ch. 167 gives a curious illustration of the settled rule that the actual writer of anything which is not a mere copy or colourably disguised copy of an existing written original is entitled to copyright as against strangers—the reporter of a public speech, for example. In this case the writing was automatic, and it was suggested that the ultimate and true author of the words written was beyond terrestrial jurisdiction. Eve J. most properly, if we may say so, held that he must do normal terrestrial justice on the matters within the jurisdiction of the Chancery Division, and decided that the plaintiff was at least in as good a position as a reporter, while the defendant, who was present at the writing and made a transcript, failed to show that his presence was necessary or that he had contributed anything to the substance. The report does not disclose in what sort of English 'The Chronicle of Cleophas' was written, but one may collect that the style more or less resembled that of the Authorized Version.

W. Higgins, Ltd. v. *Northampton Corporation* [1927] 1 Ch. 128; 96 L. J. Ch. 38, decided only one point, namely, that where a special form is imperatively prescribed by statute for the contracts of a public body, there can be no question of rectifying a contract so made; for that would amount to enforcing an informal agreement which the Court is forbidden

to enforce. Apart from that fatal objection, the facts raised a somewhat curious question whether rectification was the proper remedy. Simplified a little, the plaintiff's case (in fact that of assigns claiming through him) was that he had tendered for building work in answer to an invitation setting forth the particulars, and was misled by an ambiguous statement into making a tender for a price which, on the corporation's understanding of the terms as expressed in the formal contract, was much to his disadvantage. Now it is essential in a suit for rectification to show not only that the agreement as framed fails to express the common intention of the parties, but that there was a true common intention which it ought to have expressed. How is a common intention to be found on facts of this kind? It would seem, with all respect for the plaintiff's contention, that it could be done only by making out that the defendant had so misled the plaintiff as to be estopped from denying that the plaintiff's intention was also the defendant's: see *Whiteley* v. *Delaney* [1914] A. C. 132; 83 L. J. Ch. 349; *Lovesy* v. *Smith* 18 Ch. D. 655; 49 L. J. Ch. 809. This line of argument may have occurred to the plaintiff's counsel, but been judged not supportable on the facts. Whether the builder's mistake, which was *bona fide* and serious in the opinion of the Court, would support a claim for rescission on the ground of material misrepresentation, might again be a question; but apparently that remedy was not practicable or not desired.

The familiar doctrine that persons dealing with company directors are entitled to presume that a director's apparent authority has been regularly exercised (*Royal British Bank* v. *Turquand*, and following decisions) will not be extended by fiction. Making a suspicious contract first and discovering a possible authority for it afterwards will not do. Where an existing power to delegate authority has in fact not been properly exercised, and its existence was not known to the other party, it will not assist a claim against the company: *Houghton & Co.* v. *Nothard, Lowe and Wills* [1927] 1 K. B. 246; 96 L. J. K. B. 25, C. A. As Sargant L.J. observed, 'The doctrine of constructive notice is not a positive doctrine, but a negative one operating against a person who has not inquired.' The attempt to turn it round in this fashion is worthy of an ingenious common-law pleader. Not that in this case there was much appearance of regularity about the business at best, as the learned reader may see in the report at large.

In the January number of the *Columbia Law Review* Dr. Winfield, of Cambridge, under the title 'The Foundation of Liability in Tort,' discusses the question whether the Common Law knows a general duty not to harm one's neighbours without justification or excuse, or only a number of specific duties; in technical terms, whether actions on the case are formally confined to a limited number of categories. He follows Lord Bowen and the Supreme Court of the United States in adopting the wider proposition against Arthur Cohen and Sir John Salmond. As to earlier authority, he argues that it is at most indecisive, and the argument is to my mind convincing. I will only add that it does not seem ever to have been thought material to specify the precise form of action to which an action on the case was 'consimilis.' Assumpsit, for example, is certainly an action on the case, but it is uncertain whether in trespass or in deceit.

F. P.

An article contributed to the *Law Journal* by its learned editor, Mr. Lightwood, in a series which forms an indispensable commentary on the new property legislation, contains interesting comment on Mr. Justice Astbury's important decision in *Re Alefounder's Will Trusts*, [1927] 1 Ch. 360. See 'A Conveyancer's Letter,' *Law Journal*, Vol. 63, January 29, 1927, p 96.

On January 1, 1926, by the operation of the transitional provisions of the Law of Property Act, 1925, the defendant became estate owner in fee simple in trust for himself as equitable tenant in tail with remainders over.

The Settled Land Act trustees issued a summons to determine whether, if the defendant barred his entailed interest, he could make a valid disposition of the legal estate, having regard to section 13 of the Settled Land Act, 1925, without a vesting deed having previously been executed in his favour.

Section 13 enacts that 'where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof *inter vivos* by any person . . . shall not take effect except in favour of a purchaser of a legal estate without notice. . . .'

The expression 'tenant for life' includes the owner of an

entailed interest, and therefore on January 1, 1926, the section applied to the defendant's land. When he disentailed the land ceased to be settled land within the definition in section 2.

One's first impression on reading section 13 is that the defendant being tenant for life, and having become entitled to a vesting deed, was thereafter prevented from conveying the legal estate, unless the requirements of the section should be fulfilled. This conclusion involves reading 'the settled land' as meaning 'the land which was settled land at the time when the tenant for life became so entitled.'

But this interpretation would lead to an absurdity. For the 'execution of a vesting instrument pursuant to the Settled Land Act' is an impossibility in respect of land which is not at the time settled land, and if it were possible would be pointless.

It is fortunate, therefore, that Mr. Justice Astbury held that the section ceased to apply when the land ceased to be settled land. Mr. Lightwood supports the learned judge's conclusion on grounds of convenience. It is respectfully submitted that it is sound in law as well as in policy, on the ground that when there are two possible interpretations of a confused statutory provision, both of which assume some distortion of language on the part of the draftsman, and one of those interpretations produces absurd consequences while the other does not, the latter is right on principle.

What the originators of this section intended it to mean is irrelevant now to its interpretation, but is an interesting subject for speculation. Evidently the Lord Chancellor put an interpretation upon it different from that of Mr. Justice Astbury, or he would not have spoken as he did in the House of Lords on December 21, 1925. Attention had been directed by Lord Dynevor to the consequences which would follow from reading section 13 with the provisions declaring a settlement to exist when the land is charged with a life rentcharge: Settled Land Act, s. 1, sub-s. 1 (v). The Lord Chancellor explained that in cases in which land had been sold before 1926 subject to an annuity, with an indemnity against it, the difficulty could be averted by obtaining *before January 1, 1926*, a release from the rentcharge executed by the annuitant. Obviously the Lord Chancellor was then of opinion that a release after January 1, 1926, would not be effective to prevent the application of section 13. If his advisers differed from him they did not convince him. For it is clear from his speech on the second reading of the Amending Bill on March 16, 1926, that his view was unaltered, as he admitted the necessity of doing something to

remedy the inconvenience caused in those cases in which releases had not been obtained before January 1.

The remedy provided is section 1, sub-section 1 of the Law of Property (Amendment) Act, 1926, which enables a person beneficially entitled to land for an estate in fee simple, or for a term of years absolute, subject to any estates, interests, charges or powers of charging, subsisting or capable of being exercised under a settlement, to convey or create a legal estate subject to a prior interest as if the land had not been settled land.

In consequence of this provision of the Amending Act and of Mr. Justice Astbury's decision the position of a beneficial owner of land subject to a life rentcharge is a great deal more satisfactory than it seemed likely to be. For he can either convey the land subject to the rentcharge, or obtain a release from the rentcharge and sell as beneficial owner of unsettled land.

H. A. H.

The good ship *Jupiter* is becoming a familiar figure in the Admiralty Court. We have already commented upon some of her earlier adventures (Vol. XLII (1926), p. 6). In January of this year she made a further appearance before Hill J. ([1927] P. 122). The *Jupiter* originally belonged to a Russian company, which in 1919 transferred its seat and its operations from Petrograd to Marseilles. Later, a French Court appointed administrators of the company's property. The agents of the Soviet Government in England succeeded in inducing the master of the ship while she was laid up at Dartmouth to hand over the ship to that Government, and in an action *in rem* to recover the ship brought by the company and its administrators it was held ([1924] P. 236), that the writ must be set aside, because the action impleaded the duly recognized Government of a sovereign State. Thereupon the Soviet Government sold the ship to an Italian company, and her original owners issued a writ in another action *in rem*, to which the Italian company entered an appearance, and which it moved to set aside on the ground that the action impleaded a sovereign State by calling into question its right to sell the ship. This motion was rejected ([1925] P. 69), and the action proceeded and recently came to trial.

Hill J. first held that the method by which the French administrators were deprived of the possession of the ship upon its delivery by their custodian to the agents of the Soviet Govern-

ment was wrongful. Therefore, *prima facie*, the administrators were entitled to recover possession unless the defendants, the Italian company, could show that their vendors, the Soviet Government, had a superior title. The defendants' answer to that was to put in an affidavit by the Russian Chargé d'Affaires in Great Britain to the effect that at the time of the sale to the defendants the Soviet Government had the ownership and the possession of the ship. This assertion, it was contended, being made on behalf of the duly recognized Government of a sovereign State, was conclusive of the ownership of the defendants. Hill J. rejected this contention, and, being therefore free to examine the history of the *Jupiter* during the period of disorder in Russia, held that she never had become the property of the Soviet Government, who accordingly had no title which they could transfer to the Italian company.

The facts are complicated, but the learned Judge's view of the law is clear, and may be stated in the form of the following proposition in that the conclusiveness of the assertion by or on behalf of a foreign Sovereign that certain property belongs to him, only applies when the immunity of that property from British jurisdiction is the question before the Court; for instance, in cases like *The Parlement Belge* (1880) 5 P. D. 197, and *The Porto Alexandre* [1920] P. 30.

At first sight it is not easy to reconcile the decision in this case with *Luther* v. *James Sagor & Co.* [1921] 3 K. B. 532, but the distinction seems to lie here: firstly, in *Luther's Case* the Court was not asked to accept a statement by a representative of the Soviet Government that what was formerly the plaintiff's timber had become the property of the Government as the result of its nationalization decrees; what was in question was the validity of those decrees in an English Court. In the second place, it was admitted that the timber in *Luther's Case* was within the jurisdiction of the Soviet Government at the time of those decrees, whereas in the present case the learned Judge expressly stated that he was unable on the evidence to find that the *Jupiter* had ever been so situated.

A. D. McN.

The majority judgments of the House of Lords in *Jones* v. *Waring & Gillow* [1926] A. C. 670; 95 L. J. K. B. 913, in reversing the order of the Court of Appeal, have clarified to a considerable extent the uncertain law on the subject of money paid under a mistake of fact. The general principle that money so paid can be recovered was laid down in *Kelly* v. *Solari*, 9 M. & W. 54, but since that case was decided a number of exceptions to the rule have been developed. It was generally believed by the profession that there was such an exception where the defendant had been led by the plaintiff's mistake to alter his position to his own disadvantage, and some of the language used in *Kleinwort* v. *Dunlop Rubber Co.*, 97 L. T. 263, and *Holt* v. *Markham* [1923] 1 K. B. 504, certainly gave colour to this view. The majority of the House of Lords have, however, rejected it, and have now laid down the rule that a plaintiff in such a case is not estopped from recovering the money unless he was under a duty of care to the defendant as, for example, in the case of agency or of banker and customer. Lord Sumner's judgment on p. 696 is of particular value in pointing out that the confused ideas on this subject are due in large part to 'the peculiar character of coin or currency.' If we think in terms of misdelivery of goods instead of money the point at issue is simplified.

When this case was before the Court of Appeal—[1925] 2 K. B. 612; 94 L. J. K. B. 594—Scrutton, L.J. said: 'When I gave judgment in the case of *Holt* v. *Markham* I began by saying that that was a very difficult instance of a difficult branch of the law, and I repeat now the remark I made then.' The result of the appeal to the House of Lords will probably have done nothing to change the learned Lord Justice's views as to the difficulty of these cases.

As a general rule any servant is acting within the course of his employment if, upon an emergency, he does an act which is for the protection of his master's property, even though the act lies outside the scope of what he was employed to do (*Rees* v. *Thomas* [1899] 1 Q. B. 1015). *Poland* v. *Parr & Sons* [1927] 1 K. B. 236; 96 L. J. K. B. 152, makes it clear that this rule extends to cases in which the servant acts in the honest but mistaken belief that property is in danger. A carter, in the employ of the defendants, on his way home to dinner, mistakenly thought that a boy was pilfering sugar from a waggon belonging to his

employers. To protect the sugar he struck the boy a blow whereby he was injured. The defendants were held liable for their servant's act which, though unnecessarily violent, was not so excessive as to take it out of the class of acts which he was authorized to do. It was further held that an act is not placed beyond the scope of the servant's duty by the fact that the time is not an hour at which he is ordinarily at work.

The servant must, however, be acting in defence of the property to bring his act within the implied authority. If he knows that there is no further danger to the property and is merely trying to bring a wrongdoer to justice then he is acting outside the scope of his employment (*Abrahams* v. *Deakin* [1891] 1 Q. B. 516) unless, of course, he is specifically authorized to act as he did. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done (*Allen* v. *London & South Western Ry. Co.*, L. R. 6 Q. B. 65).

Frampton v. *Gillison* [1927] 1 Ch. 196; 95 L. J. Ch. 555, C. A., is an illustration of the rule that in construing agreements 'greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent' (*Ford* v. *Beech*, 11 Q. B. 866). The defendant had bought a shop subject to a covenant that 'trading upon the land shall be restricted to chemistry and druggist's business and dentist or doctor.' Thereafter, he was appointed a sub-postmaster, and the question was whether, in carrying on a post office, he was violating the above covenant. The Court of Appeal, in dismissing the appeal from the Court of first instance, held that, for the purpose of this covenant, the business of a post office did not constitute the carrying on of a trade. As Warrington L.J. said: "The question which we have to determine is not whether as an abstract proposition the Postmaster-General can be said to be carrying on a trade, but whether as between the parties who made a contract of this kind, either of them conceived that the business carried on by the Postmaster-General or his agents on his behalf was a trade.' This case, therefore, must not be taken as a precedent where a restrictive covenant is introduced for residential purposes.

It must be rare indeed that a person is convicted and fined under a non-operative statute. In *R.* v. *Kynaston* (*The Times*, December 14, 1926) a doctor was fined for a contravention of the Dangerous Drugs Act, 1925. When the case reached the Court of Criminal Appeal, it was discovered that section 7, sub-section 3 of the Act provides that it ' shall come into operation on such date as his Majesty may by Order in Council appoint.' As no Order in Council had been made the Act was inoperative, and the conviction was therefore quashed. As the Lord Chief Justice remarked, ' this prosecution resembles nothing so much as pulling a bell handle without a bell at the other end.'

The *Mostyn* [1927] P. 25; 96 L. J. P. 1, shows how difficult it may sometimes be to discover the *ratio decidendi* of a case. The Court of Appeal confessed that they felt very considerable doubt in ascertaining the principle on which the House of Lords had decided *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, a case in which the interpretation of the statute at issue in the present case was considered. Lord Justice Atkin, in analysing one of the judgments, was unable to determine whether Lord Hatherley ' was concurring in the appeal being allowed, or the appeal being dismissed, or whether he was concurring in the opinion given by Lord Cairns.' Under the circumstances the Court felt that it would be more satisfactory ' that the House of Lords who can survey this decision, should have the opportunity of saying what it really means.'

Although in general a statute must be literally interpreted the Courts will not follow this rule when such an interpretation leads to a result so unreasonable that it is self-evident that the Legislature could not have meant what it has said. In *The Ruapehu* [1927] P. 47; 96 L. J. P. 18, it was held that a strict interpretation of section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, ' would lead to absurdity.' The Court therefore gave effect to the nearest possible interpretation as ' the plain meaning of the words must not be cut down further than is necessary in order to avoid an absurdity.' An interesting distinction was drawn between anomalies which are so great as to amount to an absurdity and those which are not, but this, of course, is a question of fact in each case, and no rule as to the exact measurement of absurdities can be laid down.

A learned contributor sends us the following note:

In *Cohen* v. *Sellar* [1926] 1 K. B. 536; 95 L. J. K. B. 629, *et sqq.*, some reference was made to the Roman law on the subject of gifts by a man to his betrothed: the question was of the right to the engagement ring, the marriage being broken off.

If a gift be made *simpliciter*, *i.e.* without reference to the marriage, it is an absolute gift, irrecoverable in any event: the fact of being betrothed is not a disqualification for receiving absolute gifts. But if it is given, *hac mente*, that it is to be absolute only if the marriage occurs, and the marriage does not occur, either from death of a party, or the lady's refusal, or, presumably, if the marriage becomes legally impossible, the thing can be recovered (see Gothofredus, *ad* C. Th. 3. 5. 2). Of course if it is the donor who refuses the marriage he cannot recover the gift as he has prevented the satisfaction of the condition (D. 50. 17. 161). These rules are laid down in Vat. Fr. 262; D. 39. 5. 1. 1. 2. 7 and 3. The gift of the ring is certainly of the second type, and the result is reached by treating the gift as subject to a resolutive condition. If it had been construed as a gift '*causa matrimonii futuri*,' the marriage being merely the *causa* and not a condition, it is not so clear that the gift would be recoverable in case of death. Vat. Fr. 262 calls it '*causa*,' and deals only with refusal. There is, in fact, conflict in the texts on the question whether a *datio ob causam* was recoverable where *casus* had prevented completion (D. 14. 4. 3. 3 *et sqq.*; *h. t.* 16; 39. 5. 2. 7. See Girard, Manuel (7) 625). But after Constantine this point could not arise in the present connexion. He enacted (C. Th. 3. 5. 2= C. Just. 5. 3. 15, where it is made obscure), rejecting an opinion of the *veteres*, that such gifts stood good in any case, that if it was in any way in contemplation of marriage it was subject to this resolutive condition, and the rules stated apply.

A ring may be thought of as '*arrha*,' so that it is possible to consider the matter as one of *arrha sponsalicia*. The rules in later law seem to be much the same (see, *e.g.* C. Th. 3. 5. 10= C. Just. 5. 1. 3), except that there were penalties of *duplum* or *quadruplum* for wilful breach. But this does not seem to have applied to this sort of thing. *Arrha* was something expressly so given, usually a substantial sum of money: it is not probable that the fickle suitor had to give the lady a bundle of rings.

The best recent account of these matters will be found in Cornil, Droit Romain, see especially pp. 592 *et sqq.*

Cayzer, Irvine & Co. v. *Board of Trade* [1927] 1 K. B. 294; 95 L. J. K. B. 1054, shows upon what a slender basis of precedent rest some of the most familiar of our text-book maxims. 'Chitty on Prerogatives of the Crown,' p. 82, states that 'though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and especially mention him,' and this statement has been repeated by numerous writers of text-books on constitutional law. It seems to follow that the Crown can rely on a statute by which it is not bound. The authority for the rule is, however, very doubtful and scanty. In *The Case of a Fine levied by the King* 7 Co. Rep. 32 a, it is said: 'It is agreed in all our books that the King shall take benefit of any Act, though he be not named,' so that the King could levy a fine to bar his issue from succeeding to an estate of which he was tenant in tail. It is, however, difficult to see how these statutes could bind the Crown. In any case, the quotation is from a consultation of Popham C.J. and Coke A.-G., affirmed by Fleming and Coke C.JJ., and Tanfield C.B., and was not a judicial decision. The quotation of Chitty is probably taken from *The Magdalen College Case* 11 Co. Rep. 66 b, where it is said in argument, at p. 68 b: 'Be the statute affirmative, or be it negative, which is stronger, it shall not bind the King unless he is specially named, but he shall take benefit of a statute although he be not named.' This, however, is a statement in an unsuccessful argument by counsel, and is therefore of little value as a precedent. The present case was concerned with the right of the Crown to rely on the Statute of Limitations. It is settled law that the 21 Jac. 1, c. 16, does not bind the Crown, for it is not named therein: *Lambert* v. *Taylor* 4 B. & C. 138; *Works, etc., Commissioners* v. *Pontypridd* [1920] 2 K. B. 233. But it appears never to have been decided that the Crown can rely on it. In fact, the only relevant case can be quoted against such a right. In *Rustomjee* v. *The Queen* 1 Q. B. D. 487, 491, counsel for the Crown pleaded that the Crown could take advantage of the statute. To this Blackburn J. replied: 'The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it.' Later (at p. 496), he said: 'With regard to the Statute of Limitations, I do not think it is necessary to say any more. There seems to be no pretence for saying that the statute applies at all to the Crown.' The case was, however, decided on another point, and was one of a petition of right.

In the present case the point was not argued for the Crown, as

it had a strong defence on another point. Scrutton L.J. pointed out the lack of authority on the matter, but refused to give an opinion without hearing counsel.

W. I. J.

That the implications of *Scott* v. *Avery*, 5 H. L. C. 811, have not even yet been thoroughly explored is luminously exemplified by the judgments delivered in the Court of Appeal in *Cayzer, Irvine & Co.* v. *Board of Trade* [1927] 1 K. B. 294; 95 L. J. K. B. 1054 (discussed on last page, on another point). The earlier case decided that a clause in a contract providing that the holding of an arbitration should be a condition precedent to the right to bring an action, afforded a good defence to any action brought on the contract except on an award so obtained. The later case has carried this doctrine a stage further. An arbitrator under a submission of the *Scott* v. *Avery* type had to adjudicate on a claim which arose more than six years before the commencement of the arbitration. It was held by the Court of Appeal that there was no room for the application by the arbitrator of the Statute of Limitations, inasmuch as no cause of action could arise on the contract till the making of the award, and that therefore time had not begun to run. From the principle so laid down it appears to follow inevitably that an arbitrator under a submission of this type is not administering legal rights at all—for otherwise in every case he would be bound to hold that the claimants had no cause of action, and to make his award in favour of the respondents. On the other hand, if he is not administering legal rights, it would appear that his award would not be capable of being set aside for error of law on the face thereof, and that the Court would never order him to state a case on any question of law, for with questions of law he would have nothing to do. It may be that this is so, but it seems a little striking.

Gifford v. *Dent* [1926] W. N. 336 is an interesting illustration of the maxim *Cuius est solum, eius est usque ad coelum.* Many maxims are mere abbreviated half truths shrouded in exceptions, but the one above is invariably the whole truth. The Air Navigation Act, 1920, s. 9, is the exception which proves our general rule, for, provided certain conditions are observed, no trespass is committed by a person who flies over the land of another; but absolute liability is imposed if any damage is

caused to the land of that other. The plaintiff here was tenant of a ground-floor shop and basement with forecourt projecting into the street. The defendant was tenant of the front room on the second floor, and had affixed to the front wall of his room an illuminated advertisement projecting about five feet from the wall. The plaintiff brought an action against the defendant claiming an injunction on the ground (*inter alia*) of trespass on the forecourt. Romer J. found the sign caused no damage, but as the plaintiff was tenant of the forecourt, he was also tenant of the space above. The projection was therefore a trespass, and with great reluctance the learned judge felt obliged to grant an injunction to the plaintiff.

T. E. L.

The decision in *Re Bird; Watson* v. *Nunes* [1927] 1 Ch. 210 is likely to cause difficulty and is of particular importance because the facts are not uncommon. A testator who died in 1902 devised his residuary estate to trustees upon trust for A. B. Nunes for life with remainder to such children of A. B. Nunes as should attain twenty-one or being daughters marry under that age. The testator also charged his residue with certain annuities but provided that the trustees should appropriate property to meet the annuities, and that they should then cease to be a charge on any other property. This appropriation was made. The trustees were declared to be trustees for the purposes of the Settled Land Acts. A. B. Nunes, died in 1918 leaving one son, R. A. Nunes, who had attained twenty-one and two who had not. The proceedings were brought to ascertain who had the power to sell the land. The learned judge decided that on the true construction of the will two-thirds of the income of the property must be accumulated to follow the *corpus* while one-third was payable to R. A. Nunes, who had become absolutely entitled to that third of the *corpus*.

The summons raised the question whether the trustees were trustees for sale, but this the learned judge refused to decide, on the ground that the view he had formed of the application of the Settled Land Act rendered such a decision unnecessary. This appears to be tantamount to a decision that if, apart from a trust for sale, the property can be treated as settled land, then it is possible to use this as an alternative method of making a title. This view is hard to reconcile with the provisions of the Law of Property (Amendment) Act, 1926, minor amendment to

the Settled Land Act, s. 1, which provides that section 1 shall not apply to land held upon trust for sale, and it may here be remarked that the decision was made after the passing of this statute. It is respectfully submitted that the intention of the provision was to exclude land held upon trust for sale from being treated as settled land subject to the powers conferred upon trustees for sale by the Law of Property Act, s. 28, sub-s. 1. Colour is lent to this view by section 36 of the Settled Land Act, which requires an estate owner where land is held in trust for persons entitled in person in undivided shares to vest the property in the trustees on trust for sale—*i.e.*, the statutory trusts. This section does not appear to have been referred to in this case.[1]

Having so disposed of the original question his Lordship held that the property appropriated was within the Settled Land Act, s. 1, sub-s. 1 (v), while the property not so appropriated was within the Settled Land Act, s. 1, sub-s. 1 (iii), as 'limited in trust for any person . . . contingently upon the happening of any event'; the contingency being that if R. A. Nunes's brothers did not attain twenty-one he would be entitled to the whole fee simple. This would appear to constitute two settlements upon the reasoning contained in *Re Ogle's Settled Estates* [1927] 1 Ch. 229, since the one settlement will be constituted by the will, while the other is contained in the will and the deed of appropriation. This question was not raised in the case under consideration, but if this view is the correct one it would seem that the proper course would be to have two vesting deeds in such a case.

The learned judge then went on to decide that in both cases there was neither a tenant for life nor a person having the powers of a tenant for life under the Settled Land Act, s. 20, and that therefore the trustees of the settlement were the proper persons to exercise those powers under the Settled Land Act, s. 23.

It is respectfully submitted that these results give rise to further difficulty.

Unfortunately it does not appear whether R. A. Nunes attained twenty-one before or after January 1, 1926. It is submitted that this is material because the learned judge (at p. 217) implicitly held that he was entitled to an undivided share in the land in possession, and since there cannot as a mathematical proposition

[1] Reference may now be made to *Re Ryder & Steadman's Contract* [1927] W. N. 69, which it is submitted supports this view and illustrates the position of settled land held in undivided shares.

be only one tenant in common the trustees must also have been entitled to the remaining two-thirds share in common with him. Hence, it would appear that if at the date of the commencement of the Acts this tenancy in common had existed the Law of Property Act, 1925, Sched. I, Part IV, must apply.[2] In the other event it is submitted that the Settled Land Act, s. 36, would be the appropriate authority, and until the trustees had vested the property in themselves as trustees for sale the land would remain settled land: Settled Land Act, s. 36, sub-s. 1. This view, however, is subject to criticism in the facts under consideration on the ground that at least in the case of the land which is unappropriated the settlement has determined without a vesting deed and that therefore it vested in the trustees and R. A. Nunes on trust for sale as joint tenants upon trust for themselves as tenants in common, but without a full report of the decision in *Re Alefounder's Will Trusts* [1927] W. N. 32,[3] it is impossible to discuss this question adequately.

The last point for consideration is the question of who was the estate owner under the settlement held to exist. The alternative to the trustees was R. A. Nunes, who was, in the words of the learned judge (at p. 216) 'a person of whom it is true to say that under the will land is limited in trust for him, for an estate in fee simple contingent on the happening of the various events'—*i.e.* the death of his brothers under age. He was not, as his Lordship pointed out (at p. 217), the tenant for life under the Settled Land Act, s. 19, sub-s. 1, because he was not beneficially entitled to the settled land, since the Settled Land Act, s. 117, sub-s. 1 (ix), excludes land held in undivided shares from the definition. The Settled Land Act, s. 20, however, includes (sub-section 1 (ii)): 'a person entitled to land for an estate in fee simple . . . with or subject to, in any such cases, an executory limitation, gift, or disposition over on failure of his issue or in any other event.' The learned judge distinguished the case before him from those contemplated by the section on the ground that 'he cannot be said to have that interest in possession,' a necessary requisite from the opening words of the Settled Land Act, s. 20, 'when his estate or interest is in possession,' although he said that he might well be a tenant in fee simple subject to a disposition over. It is to be inferred that the reasoning depends upon the fact that the rent as to two-thirds was to be accumulated and paid immediately to R. A. Nunes. Following this argument it would appear that

[2] Also see *Re Ryder & Steadman's Contract, supra.*
[3] Since reported [1927] 1 Ch. 360.

the interest in the fee simple is simply a contingent interest, and in these circumstances the reasoning may be respectfully adopted though it may be somewhat inconsistent with his Lordship's own description since when the contingency has happened there will be no disposition. But assuming it to be correct it is respectfully suggested that it makes essential the view that the vested interest in possession, subject to the contingency, must be in the trustees and that they must hold as tenants in common with R. A. Nunes, and that this confirms the view already put forward.

In conclusion it may be said that it is thought that sufficient indication has been given to show the improbability of the matter resting where it is. The facts are not difficult or uncommon, but the precise application of the new legislation to them is not free from difficulty, and it is very respectfully submitted will require further investigation before it is finally settled.

H. P.

The Law of Property Act, 1925, s. 28, was again before the Court in *Re Gray* [1927] 1 Ch. 242, but on a different point. Stated shortly, the points in issue were whether (a) trustees for sale had the powers of management under S. L. A., s. 102, although the beneficiaries were not under age, and (b) repairs could be effected under that section and paid for out of income, overruling *Re Hotchkeys*, 32 Ch. D. 408. Clauson J. held that the powers under S. L. A., s. 102, were conferred upon all trustees for sale, notwithstanding that it was not during a minority that they were to be exercised. He then held that under S. L. A., s. 102, sub-s. 2 (b), repairs could be made, and under sub-section 3 of the same section the cost of repairs could be paid out of income. This decision involved treating the case of *Re Hotchkeys*, *supra*, as no longer applicable, since provision had now been made by statute, and hence the equitable principles were no longer necessary. The order made by the learned judge was that the repairs should be effected and 'ought to be paid by the trustees out of the income of the property.' It is not very easy to decide from the report of the case whether this order will apply to all cases where repairs are necessary. The language of S. L. A., s. 102, is not very easy to construe. The section begins by providing that during a minority the trustees 'may enter into . . . possession,' and in such case 'the

subsequent provisions of this section shall apply.' Trustees for sale will, it is presumed, be in possession so that, assuming that there is here a discretion, it could not be exercised by such trustees. S. L. A., s. 102, sub-s. 2, then provides that 'the trustees shall manage or superintend the management of the land with full power—' Once in possession they apparently have no alternative; they must manage or superintend, but must they exercise their powers *(inter alia)* of repairing? Powers are usually regarded as permissive, but the last mentioned, (h), is 'generally to deal with the land in a proper and due course of management'; and this has the look rather of a direction than of a permission, but probably it was inserted out of abundant caution to ensure that trustees acting in the case specifically provided for, *i.e.* a minority, should be fully covered.

It is, however, S. L. A., s. 102, sub-s. 3, which deals with the question of paying for the repairs out of income, and here again the terms are purely permissive—'the trustees may from time to time.' It is submitted that this leaves a discretion in the trustees to pay for the repairs out of income or not. It may, however, be that the true construction is that if the repairs are made under sub-section 2, then the income must be utilized to defray the cost under sub-section 3; and this view might be supported by the decision under discussion. If this be the case it is submitted that since trustees must keep the property in repair under general principles the income must always bear the cost. A further difficulty, however, will arise from the proviso in L. P. A., s. 28, sub-s. 1, which confers the powers of management under section 102. The proviso renders necessary the consent of any persons whose consent is necessary to a sale. Any such person would normally be the tenant for life on whom the cost of repairs would fall. It is easy to see that in these circumstances some difficulty might be experienced in obtaining the necessary consent. Recourse might then be had to the more general power to effect improvements under the S. L. A., s. 83, but these would not always be adequate. Should this be the case it may be that an application to the Court would have to be made, and that the principles in *Re Hotchkeys* cited above would still be applicable. This result is not altogether satisfactory, but follows somewhat naturally from the application of provisions designed to meet a particular case to facts much more general in character.

H. P.

The extension of the law of bankruptcy to married women who carry on a *business* in the alternative to a trade by the Bankruptcy Act, 1913 (now Bankruptcy Act, 1914, s. 125), has received judicial interpretation in the case of *Re A Debtor* [1927] 1 Ch. 97; 96 L. J. Ch. 28. An actress and professional singer undertook to produce at music-halls certain scenes and vocal acts for a fixed sum, out of which she was to provide necessary assistance, vocal and instrumental. In this respect she incurred liabilities which were not fulfilled, and a petition was filed in bankruptcy. The petition was dismissed by the Registrar on the ground that, as she was engaged in a profession, she did not carry on 'a trade or business' within section 125. On appeal the Court of Appeal reversed the decision of the Registrar. The Court held that though she might not be carrying on a trade she was certainly engaged in a business since she incurred liabilities to others in the course of fulfilling her contract. The Master of the Rolls appeared to be prepared to adopt the definition of a business accepted by Jessel, M.R., in *Smith* v. *Anderson*, 15 Ch. D., at p. 258: 'Business, employment; that which occupies the time and attention and labour of a man for the purpose of profit or improvement.' He went on to add (at p. 104): 'a profession may be included by the word "business," and that if when using the word "business" it is desired to exclude profession, profession should be expressly mentioned.' This was with reference, however, to the Finance (No. 2) Act, 1915, s. 39 (c). Along these lines it would appear that any occupation followed with a view of profit, whether properly described as trade or profession would be a business. For example, it might be assumed that a married woman who pursued the vocation of a member of the Bar might be brought within the scope of the section, were she so unfortunate, even although she is unable to sue for her *honoraria*. Scrutton L.J., however (at p. 106), carefully guards himself by saying: 'I am not going to decide to what extent purely personal service known as professional is within the section.' In this connection it must be borne in mind that so long as the married woman is carrying on a trade or business she is subject to the bankruptcy law in respect of all debts incurred by her during that period, whether connected with the business or not. This view was expressly accepted by Scrutton L.J. in his judgment. Therefore it is submitted that it would be extremely inconvenient, to say the least, to make any exception. Some stress, indeed, was laid on the fact that the contract undertaken by the debtor had incurred liabilities in its fulfilment. In this matter it is difficult

to envisage circumstances in which some such liabilities would not be incurred since it is probably impossible to carry on any vocation without certain 'extras' such, for example, as chambers, office room, or in the case of a singer agents and theatrical costumiers, to say the least. The most difficult case would be that of the purely salaried servant, and it is here doubtless that the married woman would reap a benefit which, in the light of the Sex Disqualification Act, has a somewhat archaic look.

H. P.

The Functions of Nautical Assessors.

'It would, I think, be intolerable if Admiralty appeals were treated as being not from one judge to another but from one assessor to another.' In these words Lord Birkenhead, L.C., in *The San Onofre* (*No.* 1), heard in 1919, and now reported [1927] A. C. 162n, drew attention to a matter which *The Australia* [1927] A. C. 145, raises again in an acute form. The case arose out of a collision in the Scheldt between the steamships *Australia* and *Nautilus*. In the Admiralty Court the President found that the *Australia* was to blame for being on the wrong side of the river, and, in accordance with the advice of the Elder Brethren, that the *Nautilus* was also in fault for not reducing her speed. The Court of Appeal put the same question to their nautical assessors as the President had put to the Elder Brethren, and received answers that the *Nautilus* was not in fault in not slackening speed. Accordingly, the Court of Appeal reversed the judgment of the President, but frankly said that, although they were inclined to agree with their assessors, had it not been for the advice given them they would not have ventured to disturb the judgment. The assessors in the House of Lords advised that under the circumstances it was unskilful and unseamanlike for the *Nautilus* to keep her speed. Their lordships (Lord Carson and Lord Blanesburgh dissenting) came to the same conclusion, and accordingly the order of the Court of Appeal was reversed and the decree of the President restored, but their lordships were careful to state once more, and very emphatically, that the Court must make up its own mind on questions of nautical skill and seamanship. Lord Sumner said: 'Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear the responsibility, is both copious and old.' Phrases such as the following were, as his lordship pointed out, quite contrary

to authority: 'That being the advice given us by the gentlemen who are sent by Parliament to advise us, I feel bound to follow it. . . . I think we are bound . . . to follow the advice of our assessors, without expressing any opinion of our own.'

It must, however, be a source of considerable embarrassment to the appellate tribunals when their technical advisers cannot agree on the advice to be given. There is not always safety in the multitude of counsellors. Lord Birkenhead in *The San Onofre* (*ibid.*) said that he was by no means satisfied that assessors would be necessary in the House of Lords at all if the advice of the assessors in the Court of Appeal was elicited by written questions. In salvage cases the supreme tribunal is not always assisted by assessors, and the practice of summoning, as a matter of course, Elder Brethren of the Trinity House, or Trinity Masters, as they are generally called, in such cases to assist the judge of the Admiralty Court is also comparatively modern: see *The Houthandel* (1853) 1 Spinks 25. The practice however, as regards collision cases is of very ancient usage. The first occasion on which nautical experts—*consilium artis nautice peritorum*—were called in, appears to have been in 1673, when they concurred in a judgment of Sir Leoline Jenkins finding the defendant's ship alone to blame: see 'Select Pleas in the Court of Admiralty,' edited for the Selden Society by R. G. Marsden, vol. ii, p. lxxxv. Formerly, both in collision and in salvage cases, the judge used to sum up the evidence to the Trinity Masters, but in 1867 Sir Robert Phillimore discontinued the practice: see *The Hannibal*, L.R. 2 A. & E. 56. Incidentally, Lord Phillimore, when he observed in *The Artemisia* [1927] A. C. 164n., that it is 'almost an accident which of the several pairs [of assessors] assist the Court below and which the Court of Appeal or your lordships' House,' would appear to have forgotten, momentarily, that Trinity Masters only sit in the Admiralty Court; the assessors to the Court of Appeal are appointed by the Master of the Rolls, and those to the House of Lords, who are all naval officers of flag rank, by the Lord Chancellor.

There is no doubt that judges have not infrequently appeared to treat the assessors too much as if they formed part of the tribunal. In *The Philotaxe* (1877) 3 Asp. M. L. C. 512, for example, the Trinity Masters were divided on the question of seamanship, and Sir Robert Phillimore suggested calling in a third Trinity Master, although he himself agreed with one of them. The parties, however, did not wish to incur the expense of having the case re-argued, and the judge gave his decision

forthwith. But one cannot help feeling that Lord Dunedin, in *The Australia* case, seems inclined to swing rather far in the other direction. He cannot forget, he says, 'that when assessors were introduced, ships were sailing ships, and the navigation of a sailing ship is an art which the landsman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word. So that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as possible.' But the precise moment for helm or engine action, even if not the appropriate action itself, must always, one would think, be a matter of seamanship, and, it is to be remembered, that in the House of Lords their lordships have the benefit of the advice tendered by the assessors in both the Courts below. Lord Dunedin was speaking for himself, and, it may be conjectured, did not intend his remarks to have any application to a Judge of first instance who would, it is suggested, be rash, indeed, if he only took advantage of the skilled knowledge of the assessors for 'purposes of explanation,' particularly as evidence on questions of nautical skill is inadmissible when the Court is assisted by nautical assessors: *The Sir Robert Peel* (1880) 4 Asp. M. L. C. 321. Further, if both the assessors are in agreement on the nautical questions submitted to them, the trial Judge, one would think, would hesitate long before disregarding the advice given him. There will be general agreement, however, with Lord Dunedin's protests against the view that the Court of Appeal 'is bound to pay more attention to the opinion of its own assessors than to that of those who advised the Court below.' There is, as he went on to say, 'no hierarchy of assessors.' In every case the responsibility is with the Court, and *The Australia* affords a useful reminder of the fact.

E. C. M. T.

A correspondent has sent us the following note which is of interest in view of a recent much-discussed case:—

Kaspar Hauser—a semi-idiot, '*aenigma sui temporis*,' who appeared mysteriously in 1828 at Nuremberg, and died there in 1833 equally mysteriously—was patronized, and practically adopted, by (the fourth) Earl Stanhope. Unjustifiable attacks were made upon the Earl, both in Germany and in England (in connexion with this patronage), *after his death*. His family

obtained legal redress in Germany; but found that, in the Earl's own country, our law could afford them none.

The Institut de Droit comparé of the University of Lyons has, in the past, placed chief emphasis on Anglo-American law. It has now entered a wider field by publishing, in two volumes, a translation by Professor Jules Patouillet, formerly director of the Institut Français in Petrograd, of the civil codes of Soviet Russia. This departure from the original purpose of the Institut is justified by the exceptional interest of this new legal system.

Professor Lambert has written an introduction which will prove of value to all students of comparative law. He points out that whatever our feelings may be towards the Bolshevik regime it is important for us to understand the laws under which more than 100,000,000 persons live. These codes, issued in 1922, were made necessary by the fact that the Soviet Government refused to recognise any of the laws, civil or criminal, existing before the revolution As a result an entirely new system had to be created within the shortest possible time. No adequate consideration or revision was possible, and the codes, in their contradictions and logical errors, show ample evidence of this haste. The authors were influenced by the admirable but always delusive ambition to express the laws in language easily understandable by laymen, with the result that, in many cases, what ought to be a clear and definite legal rule merely consists in a vague generalisation. This uncertainty is emphasised by the wide powers given to the judiciary. All contracts can be declared void if they are unfair or contrary to the interests of the State; damages in the case of a tort are to be fixed not solely on the basis of the loss suffered by the plaintiff but rather in accordance with the financial position of both parties. It is in this latter branch of the law that some of the most interesting legal innovations are to be discovered. It will be a surprise to many readers to find that the principle of inheritance, although strictly limited, is still recognised in Russia. Throughout the codes evidence of Professor Leon Duguit's influence can be found, but we doubt whether a study of his theories when put into actual practice will bring him many converts.

It is to be hoped that an adequate English translation of the Russian codes will soon be made, for these French volumes show

how interesting is the material contained in this new body of law.

The Lord Chancellor has appointed a strong Committee to consider the question of providing in London facilities for the study of the Laws of the Empire. The fact that Lord Justice Atkin is Chairman, and Sir Claud Schuster, K.C., is Secretary, is a guarantee of its success. It is obvious that in an empire where so many different systems of law exist, it is of the greatest importance that there should be a central legal institute. We hope, however, that the Committee will not construe its instructions in too narrow a sense, but will consider the larger question of how a great Law Library dealing with the laws of all nations can be established. It is eminently desirable that there should be some one place where the statutes and reported cases of France, Germany, and the United States, for example, can be found. It would be unreasonable to expect the various private libraries now existing to cover, even in a superficial manner, these great fields of law.

WHAT AN OLD REPORTER TOLD ME.

I.

TO students of equity the half-dozen volumes of Reports by Mylne and Craig and by Craig and Phillips have rendered familiar the surname of Mr. Richard Davis Craig as an active recorder of Chancery proceedings from 1835 to 1841. Mr. Craig was born on November 2, 1810, the eldest son of the Rev. Thomas Craig, of Bocking, in Essex. He studied and took legal honours at the London University, attending the lectures of John Austin, from whose criticisms of Blackstone he widely dissented. In 1832 he was employed by the Government to draft the Boundary Bill, which became part of the Reform Act of that year. Shortly afterwards he became the official private secretary to the Chief Secretary for Ireland, the Right Hon. E. J. Littleton (afterwards Lord Hatherton), who has recorded Mr. Craig's 'remarkable ability, energy, and industry.' In 1834 he was called to the Bar by Lincoln's Inn, and thenceforward practised as an equity draftsman and conveyancer. He is now best remembered by having been for several years, as I have said, an authorized reporter of the Lord Chancellor's decisions, in conjunction at first with Mr. Mylne and afterwards with Mr. Phillips. In 1851 he took silk, and he became a Bencher of Lincoln's Inn. He wrote in 1866 a legal treatise on 'Trees and Woods.' Deafness, unhappily, attacked him; and he consequently in 1867 gave up practice, and retired to Cheltenham. He died on May 8, 1884. On his death one of his friends wrote: 'He was a man of wonderful brain-resources. But for his breakdown in hearing, and afterwards in health, he would no doubt have been made a judge.'

In 1873, after his retirement from practice, I, then a Cambridge law-student, had had the good fortune to be a visitor in a country house where at the time he also was a guest. He allowed me to accompany him on his daily walks. Then and in subsequent years, as long as he lived, he generously gave me the rich results of his wide reading and his thirty years of assiduous practice. His freely-lavished teachings, oral

and written, covered a wide range—from the theory of judicial precedent down to the best kind of paper and pencils for drafting Chancery pleadings. I conjecture that, even after the lapse of half a century, some of his remarks and reminiscences will have an interest for present-day readers; so I venture to print some extracts from my notes and from his letters. I leave him to speak in the first person throughout.

England's first Jewish Barrister.

Mr. Francis Henry Goldsmid (afterwards Sir Francis), a son of the first Jewish baronet, was the first Jew ever called to the Bar. It was in 1833. Some felt a doubt as to the legality of such a call; and there was further doubt as to whether, in taking the necessary oaths, a Jew could be allowed to omit the embarrassing words 'on the true faith of a Christian.' These doubts were much discussed amongst the Benchers of Lincoln's Inn, to which Inn he belonged. But the Benchers finally decided in favour of the call, and consequently in favour of a modification of the form of oath.

When I was a revising barrister for the City of London (1835-1839) many Jews were sworn before me. The Guildhall officials administered the oath carefully upon the Hebrew text of the Pentateuch, lying open, the open page being kissed by the person sworn with his hat on his head. The words, 'So help you, Jehovah,' were substituted for the usual conclusion.

The Hebrew Bible on which Mr. Goldsmid was sworn at Lincoln's Inn belonged to Vice-Chancellor Shadwell. Very probably Lincoln's Inn Library possessed no Hebrew Bible. Sir J. Shadwell was deeply read in theological subjects; and I know he took a special interest in the question of Goldsmid's being called to the Bar, although of the Jewish faith. Many years before Shadwell's death, (he was only fifty-three when Goldsmid was called), on an occasion when we met at a dinner party, he happened to say: 'Last Sunday, Rothschild called on me. I gave him, as a curiosity, the Hebrew Bible upon which Goldsmid was sworn when he was called to the Bar.' When he said this, I could not help thinking that the gift had been an unwise one. For the natural person to whom to present the book would have been Goldsmid himself and certainly not Rothschild, he being the head of a party amongst the Jews antagonistic to Goldsmid's party who were reforming the synagogue services.

If there were any difficulty about the oaths usual at Lincoln's

Inn on a call to the Bar, the Benchers somehow got over it. But there remained the King's Bench oaths, which every barrister was required to take before commencing actual practice, and which did at that time contain some Christian words. It never occurred to me to think how Goldsmid got over those King's Bench oaths. But one day, a quarter of a century after his call, he was sitting by my side in the Queen's Counsels' place in Vice-Chancellor Stuart's Court. He said to me: 'I have just been down to the Queen's Bench to take the oaths in the now altered form, which I ought to have taken in the old form immediately upon my call. Hitherto I have always trusted to the annual Act of Indemnity, and have found myself practically safe in doing so.'

Sir Francis, though not in very large business, was a diligent practitioner as an equity draftsman for more than twenty years, and was always treated with great respect by the judges. He was very strict about not doing any legal work on the Jewish Sabbath. Hence, if any case in which he was counsel, and in which it was material that he should be personally present, was likely to come on in Court on a Saturday, he always applied to have it put off till another day; and upon the mere suggestion that he could not attend on a Saturday his request was always granted as a matter of course.

On one occasion a case in which he was to be my junior was appointed for a Saturday, and he was to attend me in consultation on the Saturday morning before going into Court. When I found out that my clerk had so fixed the consultation, I told him he had made a great mistake, for Mr. Goldsmid would not come to consultation on a Saturday. He answered that the solicitor had said that the case must be heard on Saturday, and therefore the consultation could not be put off. When the time for the consultation came, in walked into my room another Jewish barrister, the late Mr. Waley, holding in his hand Goldsmid's brief. We consulted, and afterwards disposed of the case that same day.

I was afterwards told that 'Some Jews in England observe the Sabbath very strictly, whilst others think the observance of it is not binding out of the Holy Land.' I suppose Jessel was of the latter school.

I was a personal, as well as a professional, friend of Goldsmid from the time of his being called to the Bar, and I was also a friend of his father for many years. They both were very ambitious men. Goldsmid and I (who was his junior in date of call) were both candidates for silk gowns. When in 1851

there appeared the list of the men so to be promoted, Goldsmid's name did not appear, but mine did. On that very day he sent his wife down to my wife to congratulate her upon this promotion, though it put me over his head, and very much to his disappointment. Was not this a gentlemanlike thing to do?

The Constitutional Value of our Bar.

It is a trite truism that the best security that Englishmen have for the preservation of all their rights, even of person and property, lies in the high character of the English judges and the English Bar. But to this I would add that, as my own experience has taught me, the character of the Bar is also the best security which Englishmen have in actual practice against any unjust exercise of the power of the judges. Observation has convinced me that a fear of the Bar is the most efficient check upon those arbitrary powers which must necessarily be vested in a judge. Even in the best of men the temptation to exercise arbitrary power in an arbitrary manner is too strong to be resisted, if it can be so exercised with impunity. The restraint of public opinion is useful, and indeed essential, but it is not sufficient; for a judge will always feel that the general public may well think itself incompetent to pronounce upon the legal justifiability of an act apparently arbitrary. But in our present system every judge knows well that those members of the Bar who practise habitually in the Court in which he sits are perfectly competent to pronounce upon the manner in which he exercises his functions. Yet even this fear would have no terrors for an arbitrary judge were it not that he knows the Bar to consist of men, not only of great technical knowledge, but also of the highest personal character. Such men, he knows, will discuss with freedom everything that he does, and will express to each other perfectly candid opinions about it. He has himself lived amongst them; he has talked with them; and he remembers that, with them, he has in his time criticized other judges just as freely as he himself is being criticized now. The greatest characteristic of the English judicial system, as compared with the judicial systems of the other nations of Europe, is our principle that the judges must be taken from the ranks of the Bar, and not from the ranks of men who from the first have been bred up to the judicial profession alone.

In this view the moral qualities of eminent counsel became a most valuable part of our professional treasures and our

professional history; for the lawyers rightly entitled to our admiration and affection are those who, in addition to great legal qualifications, have also been highly honourable members of society. I have in my day seen several great luminaries of the law who added nothing to the moral greatness of our body. On the other hand, I have seen some who, under almost every disadvantage of early social surroundings, finally proved themselves to be men of whom any profession might be proud, both for intellect and for character. A striking instance of this was Lord Justice Lush, who was recognized to be (as all parties said at the time of his death) one of the most dignified of the judicial representatives of the majesty of the Crown. I remember how some of his early associates on the Home Circuit used to quiz his conscientiousness. Probably Serjeant Ballantine was one of these; but it is pleasant to note the genuine admiration which, in his autobiography, Ballantine more than once expresses for Lush.

Unremunerated Advice.

The etiquette of the Bar would not prevent your giving gratuitous advice to your relations and friends whenever occasion required. But it must be given incidentally only; not systematically, so as to be a substitute for the advice to be obtained from a solicitor, or through a solicitor from a practising counsel. To take an extreme instance, it would not be at all right to make it known, either directly or otherwise, that you were about to pay a visit to a part of the country where you were known, and therefore that any persons there with whom you were already acquainted might avail themselves of that opportunity of getting from you gratuitous legal advice, instead of the remunerated advice they would get in the usual manner.

Upon the same principles you would be justified in drawing up a will or a codicil, or an agreement, or even a lease, for your friends and relations, if it became incidentally necessary or desirable to do so.

It is difficult to lay down the rules on these subjects with precision. But the general guide for one's conduct as to giving gratuitous professional advice is to be careful to avoid unfairly or unnecessarily taking the place of the proper legal advisers of one's friends. In actual life I do not think that much difficulty ever arises on these matters; I have never found it. And although I have given a great deal of gratuitous advice and assistance, I am not aware of any instance in which it

could be imputed to me that I had trenched upon professional etiquette in this respect.

From Attorney-General to Master in Chancery.

A curious story of professional decline began when in 1834 Sir William Horne was abruptly displaced from the Attorney-Generalship, with its rights of succession to the highest legal dignities; and was succeeded by the Solicitor-General, Sir John Campbell. I was then in London at the Irish Office, and heard all that was passing in politics. The universal opinion was that the displacement took place at Campbell's instigation; though he, in his 'Life of Lord Brougham' (p. 426), records his very erroneous belief that 'I did not incur even a suspicion of any intrigue to push out my predecessor.' Lord Brougham, as Chancellor, had asked Horne to succeed Baron Bayley in the Court of Exchequer in order to increase the strength of equity in that Court. (For it then had an equity jurisdiction, though its decisions carry little weight in Chancery, except those of Chief Baron Alexander). Knowing that Horne, not being a common lawyer, would object to try prisoners, Brougham held out some prospect that an arrangement might be made by which he should be exempted from going circuit. Horne expressed a willingness to accept Bayley's place on those conditions. But Brougham soon found (as he might have been sure he would find) that the other common law judges would not agree to any such arrangement, for it would throw more work upon them. Brougham told Horne this, and that he must, therefore, take the place without conditions. Whereupon a dispute arose between them. Brougham insisted that Horne had accepted the judgeship, not on the condition, but only in the mere hope, of being excused from going circuit; and had thereby created a vacancy in the Attorney-Generalship, and that Campbell was to be put into it. Horne seems never to have made any formal resignation of the Attorney-Generalship; and even if he had done so, Brougham and Campbell were not justified in taking advantage of it when it was found that Horne was not to become a judge. Lord Grey, had he known of the dispute early enough, ought, as Prime Minister with whom the appointment of Attorney-General really rested, to have set the matter straight.

The only man who behaved with unblemished honour was Horne himself. He raised no objection to the judgeship as being an inadequate position, though he well might have

done so. (It is true that Sir William Garrow, when Attorney-General, became a Baron of the Exchequer. But Garrow was an incompetent man, whose success at the Bar was wholly due to his great power as a bullying cross-examiner.) Horne merely refused a new responsibility which he did not feel himself conscientiously justified in undertaking. It was not only to sentences of death that he objected, but to the whole duty of trying prisoners. There was for many years a standing joke that Vice-Chancellor Shadwell had said: 'What a fool Horne was to object to try prisoners! Why, they are all guilty.'

About 1836 Horne talked to me on several occasions about these transactions. He urged that he had never accepted the judgeship unconditionally; and he showed me a correspondence between himself and Lord Brougham which seemed to bear out his views very clearly, for there was no absolute acceptance in the papers which I read.

I remember that it was thought in Parliament that Horne behaved in a very high-minded manner under such very great provocation as would, in the case of an ordinary man, have been followed by his going into Opposition. But Horne remained on the Government side of the House and voted with his party as if nothing had happened. Lord Brougham's autobiography gives a letter from himself to Lord Grey, in which he urges that something good ought to be given to Horne, an account of his having been 'ill-used,' evidently meaning ill-used by Campbell.

Only eight months after Horne ceased to be Attorney-General, Leach, the Master of the Rolls, died. But Horne had now ceased to be 'in the running' for high office; the result must have been almost maddening to him. He continued to practise in Chancery. His speeches were very powerful in manner and tone. I remember, in one hopeless case, whilst he was speaking with great power and dignity, his junior (afterwards Vice-Chancellor Stuart), who sat beside me, said: 'Horne's manner is worth two thousand a year to him. Anybody coming into Court at this moment would regard Horne as carrying everything before him. You and I know that his case is going to certain destruction!'

But about 1839 the competition of younger men in silk gowns began to press Horne hard. Under urgent pressure from his friend, Mr. Wingfield, the father-in-law of Lord Cottenham, he reluctantly accepted from Lord Cottenham the office of Master in Chancery.

Very soon after getting into this office of Master he began

to tell his friends how disgusted he was with his new position and his work. When in 1841 two additional Vice-Chancellors were appointed, both of them much junior to himself, he was necessarily required to 'work out' their decrees. This made him still more vexed and excited; and in all his duties he showed his vexation and excitement. At last it became his habit to interject into the proceedings before him all manner of impatient exclamations and oaths. Hence, if a shorthand writer's exact note of what had passed was taken, there was sometimes so much swearing in it that it could not be read in open Court. I have myself held such a note in my hand before the Lords Justices, and have had to beg the Court to let me pass it up to them, instead of reading it aloud.

In the year 1852 came the Act of Parliament which substituted judges' chambers for the Masters' offices, and authorized the Lord Chancellor to release the Masters from their duties on full pay. Horne thus retired from office some years before his death.

Serjeants and King's Counsel.

For nearly twenty years of my life, from 1835 onwards, I saw a great deal of all the serjeants who were in actual practice; except of Wilde (afterwards Lord Truro), who never herded with any of his fellows, serjeants or not. I used to meet them at Westminster in the luncheon room at Alice's Coffee House, where it was the rule for the serjeants to 'robe,' and where a small number of other barristers, of whom I was one, also 'robed.' For during a great many years of my practice at the bar the Court of Chancery sat at Westminster; (originally for all the four terms, then for only two terms, and eventually only on 'bigwig days' reduced to one a year).

I never could understand why the absurd obligation of a common law judge to have been already made a serjeant was kept up, as it was till 1875. For a century, at the least, the selection of a man to be such a judge had nothing whatever to do with his being, or not being, a serjeant at the time. His being made a serjeant as a qualification for the judgeship was a mere farce, for he was made a judge within a day or two of his being 'called serjeant.' Yet this 'call' cost him several hundred pounds!

Promotion to the rank of Queen's Counsel, or to that of a patent of precedence, has been vastly more lavish in recent times than it was in 1850. (Perhaps the rank has consequently lost some of its prestige. I remember an ex-Attorney-General

telling me of days when he found that, if a Queen's Counsel were at the fireplace, no junior would venture there to warm himself.) The increase in the number of sitting Courts does not suffice to account for it. But the discontinuance of serjeants-at-law must be one of the reasons for making Queen's Counsel at an earlier age than was formerly usual, and thereby creating a sort of junior leadership, like that of the serjeants. Any barrister could claim the coif at seven years' standing; whereas fifteen years was usually the lowest standing for a Queen's Counsel or for a patent of precedence, and the average was considerably higher. On a barrister's claiming the coif the judges of the Court of Common Pleas were always asked whether they had any personal objection to his claim. During some few years preceding 1857 I remember that several serjeants who had patents of precedence were anxious to be made Queen's Serjeants, as this would put them above Queen's Counsel, which their patents of precedence did not. But Serjeant Shee was one of them, and there was an objection in the very highest quarter to him as a Roman Catholic. The judges of the Common Pleas, however, objected to any of the other candidates being made Queen's Serjeants, unless he was so made, lest they should be put over his head; and this objection was considered by the Lord Chancellor to be conventionally insuperable. The royal objection to Shee must afterwards have been waived; for at last, in 1857, a small batch of Queen's Serjeants was made, of whom he was one. It was long since any Queen's Serjeants had been made, and none have been made since. The last survivor was Mr. Justice Byles.

In 1850 Lord Campbell wrote in his journals (II, 227) that 'the serjeants are a very degenerate race; and, their exclusive audience in the Common Pleas being gone, it is full time that the Order should be utterly abolished.' In the very year of this suggestion one of the serjeants' exclusive privileges was abolished. It was that of being the only members of the bar associated with the judges in the commissions for holding the assizes. Thenceforward those commissions included also the Queen's Counsel practising on the respective circuits. The fitness of the serjeants for the duties of a commissioner of assize may have been universal in the days of Coke, when a serjeant was always a barrister of twenty years' standing; or even in the days of which Blackstone speaks, when the proper length of standing had come down to sixteen years. But as soon as any barrister of respectable character could claim the coif at seven years' standing, it must often have happened that he was not

at all a competent substitute for one of the King's judges. One reason why the Queen's Counsel had not sooner been put into the commission perhaps was that they could not wear a red gown, but serjeants could. A better reason was that there were so few of them on each circuit, and their civil business was so great there, that they could hardly be asked to serve as occasional judges. Queen's Counsel had, by their patents, precedence over serjeants 'in all our Courts and elsewhere.' Even the patents of precedence, which (by a custom which in Blackstone's time was new) the more successful serjeants attained after long standing, always assigned their precedence to be after the junior Queen's Counsel for the time being. Hence (except at Nisi Prius) serjeants never sat with the Queen's Counsel, unless they had patents of precedence. Even in my stuff-gown days I often sat 'behind the Bar' cheek by jowl with a serjeant. Even the rank of the Attorney-General and Solicitor-General is only the rank of being, for the time, the foremost amongst the Queen's Counsel. Hence, on ceasing to hold office, ex-Attorneys-General and Solicitors-General are remitted to whatever seniority they possessed before, whether amongst the Queen's Counsel or (as in Dunning's case) only amongst the stuff-gown barristers.

Mr. Gladstone's intimate friend, the late Mr. James Robert Hope (afterwards called Hope-Scott), preferred, for a singular reason, a patent of precedence to being made a Queen's Counsel. He was disposed to go over to the Roman Church (as he ultimately did); but not having yet actually gone over, he was not entitled to take the Roman Catholic form of one of the oaths then obligatory upon Queen's Counsel. Yet he was not willing to take the Protestant form of the same oath. He therefore wished not to be sworn at all, and a patent of precedence did not involve the taking of any oath.

In 1834 a curious attempt was made to take from the serjeants their exclusive right of audience in the Court of Common Pleas in term time. Under Lord Brougham's Chancellorship a royal warrant was issued which purported to abolish this right. As a compensation it purported to give at once to those serjeants who were not already Queen's Serjeants or holders of patents of precedence a professional rank next after the junior Queen's Counsel for the time being. The words of the warrant seemed to express an immediate grant of precedence. But the actual construction put upon them was that they gave only a right to take out patents of precedence if desired. The junior serjeant at the date of the warrant was Talfourd, the poet (afterwards a judge), but then of only thirteen years' standing at the Bar,

and only very recently made a serjeant, and not at all in a position then to expect to be made a Queen's Counsel. He took advantage of the warrant directly, and from his comparative youth and vigour he soon got a great Nisi Prius ascendancy over all the other serjeants, except Wilde (afterwards Lord Truro). After a very few years some of the serjeants petitioned the Queen in Council to review the legality of the warrant of 1834. No decision upon that petition was ever made by the Queen in Council, nor did the Privy Councillors who heard the arguments ever give any definite advice to Her Majesty about it. But the Court of Common Pleas came to doubt gravely whether they had been justified in acting upon the warrant (as they had done by hearing in term time other counsel than the serjeants). Hence they resolved upon reverting to the ancient practice of hearing during term serjeants only. But the practice, when thus resumed, had a short duration. Parliament very soon put an end to it, and set up, in substance, the warrant of 1834.

In the interval between the warrant and the resumption of the old exclusive practice, no new serjeants were created for practice at the Bar. But in 1840 some new ones were made, and thenceforward such appointments were granted upon the old seven years' principle. The persons nominated as common law judges continued to be made serjeants, as a part of their judicial qualifications, down to 1875, when the Judicature Acts removed this part of a judge's qualification. Thereupon 'The Society of Judges and Serjeants at Law' came to the conclusion that no more serjeants were likely to be made, even for practice at the bar, and consequently that they might as well sell and divide the society's existing property.

The Best of Vice-Chancellors.

The fifteen years of the Vice-Chancellorship of Sir William Page Wood, afterwards Lord Hatherley, (1853-1868) had never had its like before for industry in any judgeship of first instance; did not see its like then; and will probably never see its like again. True the Mastership of the Rolls was held for about as long by no less a man than Sir William Grant. But the duties of the Rolls then were very light, confined usually to evening sittings in Chancery and a very rare day-sitting at the Privy Council, and including no chamber business whatever. Of Wood's three contemporaries in similar judgeships—Romilly, Kindersley, and Stuart—Romilly was the only one whose

quantity of business was anything like Wood's, either in Court or in chambers. But Romilly was passionately eager for dispatch, and very much the reverse of profound; and though he protracted the hours of chamber business, it was at the cost of losing his temper under the influences of fatigue and hunger. As regards Kindersley and Stuart, the aggregate amount of work that either of them did in any year was not a third of what Wood did.

The cause of Wood's having so much chamber business was partly his patience and dispatch in the minor matters which began in chambers, and partly the great number of his decrees to be worked out there. The reasons for his making so many decrees were manifold—long and uninterrupted sittings, great patience, and plenty of ready law in his head. He was a favourite judge. This was not by any means because his decisions were absolutely perfect; (for I found that the men most constantly present at them said that they were nothing like so good as it was the fashion to call them). It was because both sides felt that they were sure to get a full hearing and a full consideration, even against his own preconceptions.

My recollections of him go back to 1835, when he was practising at the Bar. He was then in his thirty-fourth year, slightly below the middle height, very handsome, and very active and elastic in his gait and carriage. I saw a good deal of him whilst we both were stuff-gownsmen; for I had some practice before Parliamentary Committees, in which he had a large business—the only Chancery man who was much employed there then. He had a very great amount of business in the Railway Bills of 1836, which was the first year in which railway business took a start, because it was not till then that the practicality of railway travelling became evident. In 1841 Wood abandoned Committees for Chancery, because, as he told me, the then appointment of two additional Vice-Chancellors made it impossible to attend Parliamentary Committees. When in 1853 he was made a Vice-Chancellor, he had been so little distinguished as an advocate that the greatest uncertainty was felt as to his success as a judge. A very few weeks, however, showed his businesslike aptitude for judicial duty. I was engaged as a leader in many causes in his Court.

I have heard him say several times that the work of a Vice-Chancellor had 'more than doubled' since he had been appointed, less than fifteen years before. I do not think it occurred to him that there was any real difference between himself and the other Vice-Chancellors, but no really con-

siderable increase had been made in the work of the other two Vice-Chancellors. The labour of a Vice-Chancellor in chambers was balanced, in the case of those two others, by their rising in Court a little earlier every day and going to chambers only twice a week afterwards. But Wood sat an hour later than they did every day, and went to chambers every day, except Saturday, and usually remained there till six o'clock. Still this late sitting was not judicious; for although his wiry habit of body allowed it, the solicitors and his own clerks could not endure it without injury.

The rarity of any reversals of Wood's decisions, and the elaborate apologies which the usual appellate judges made when they did reverse them, increased his cause list very much. Very different were the results and the absence of apologies in the cases of other Chancery judges of first instance; to the great annoyance, I know, of one at least of these others. But the contrast never made Wood either vain or self-confident.

Written Judgments.

A curious episode arose when Lord Chancellor Campbell, in 1860, in the case of *Burch* v. *Bright*, remarked that Vice-Chancellor Wood 'would do well in such cases as that then before the Court to commit his judgments to writing.' I believe it was in this very case that I heard Bethell, whilst I was sitting beside him, open before Lord Campbell an appeal from Vice-Chancellor Wood, and say, by way of depreciating the decision: 'It was one of those garrulous judgments, which that learned judge is in the habit of delivering.' But Wood's judgments, though verbose, were never garrulous. Lord Campbell's remark alarmed the Chancery judges, as we see from the letter which three of them (the Master of the Rolls and Vice-Chancellors Kindersley and Stuart), without Vice-Chancellor Woods' knowledge, wrote to Lord Campbell. Their letter said not a word about giving written judgments. It made a much more general complaint, viz. that any judge of appeal, even the Lord Chancellor, should deem it any part of his duty to lecture the judge appealed from as to the manner in which he should give his judgment. They were warranted in thus expressing themselves; for Lord Campbell's suggestion that the Vice-Chancellor would have 'done well' to write his judgments was a complaint that he had gone into so much detail, in examining the conflicting evidence, as to give Lord Campbell unnecessary trouble. This assumed that a Vice-Chancellor was bound to

put his judgment into such a shape as would be least troublesome to the judges of appeal, and was bound to furnish the Appeal Court with the reasons of his judgments, and in the briefest possible statement of them. I have myself found, when counsel upon Chancery appeals before Lord Campbell, that he was practically incapable of that balancing of conflicting testimony which is part of a Chancery judge's duty. As a common law judge, he had always had a jury at hand to discharge that duty for him, and consequently had had no experience in it. But a properly qualified judge of appeal has an original acquaintance with the law of any case likely to be brought before him, and is bound to begin by applying that knowledge to the particular facts of the case. If he then feels difficulty in affirming the judgment appealed from, he asks if there is any note of the reasons given by the judge below. If there be a shorthand writer's note, or perhaps a counsel's note, it is handed to him by counsel. The written judgment itself, if there be one, remains still in the possession of the judge below; (unless he has handed it to his authorized reporter). Even if he has so handed it, the authorized reporter is not at liberty to allow anyone else to see it, unless it has been already printed by that reporter, and is either published or ready for publication. If the reporter can get it published in time for the appeal, he is glad to do so for fear of the case becoming non-reportable, since under ordinary circumstances it is an ill-conditioned thing to report an overruled decision. (I am, of course, speaking only of the systems of appealing and reporting as they existed in 1860.) I have very often known cases decided without any reference to a note of the judgment below. Much more than this, I have repeatedly been counsel upon appeals before the Lords Justices (who had never been other than Chancery lawyers) when they have refused to allow me to read a note of the judgment below, saying: 'It cannot be necessary.'

The question whether judgments ought or ought not to be written is one of some complexity as to its merits, and one of some interest as to its history.

About the time when Lord Cottenham was beginning to write his judgments he expressed himself to this effect: 'You cannot be sure that you understand your subject until you have written upon it.' But even he, I think, would not have written a third part of the judgments that he did write, unless he had been obliged to do so by circumstances which I will mention. If a judge, whether of first instance or of appeal, has a great deal of ready law, he will decide many cases off-hand, and therefore

necessarily orally. It is very important that he should do so to avoid delay. Many cases also are such as to require immediate decision one way or other. In the early part of Lord Cottenham's Chancellorship he disposed promptly and orally of many cases of substantial importance. Even some of the cases in which he took time to consider were ultimately disposed of orally, because the facts and points were still fresh in his recollection. Some of his early judgments, for which he got very great credit, were cases in which he had delivered oral judgments; (and with a good deal of tautology, which we, his reporters, had immense difficulty in putting into shape).

In Chancery the judicial practice as to writing judgments had varied. Lord Hardwicke had been accustomed to write notes for many of his judgments, and wrote some judgments in full. But I do not think Sir William Grant wrote his judgments. Lord Eldon certainly did not write his; and in his later years Bethell's epithet of 'garrulous' would have been very applicable to them. I knew this about Lord Eldon, because I reported, for the second volume of Mylne & Craig, his judgment in *Bernal* v. *Bernal*, abridging it enormously; for it was hardly possible for anything, legally so profound and accurate, to be made into greater twaddle than he made that very important judgment by talking for some hours till the end of the day and then saying: 'Having thus far probed the subject to-day, we will continue it to-morrow.'

After Eldon's Chancellorship came that of Lyndhurst, who had been familiar with written judgments in the Common Law Courts. His first Chancellorship lasted nearly four years (1826-1830). Many of his judgments during it are reported, but scarcely any of them were ever cited in my thirty-two years of practice. From his indolent and self-indulgent habits during those years it is not likely that he wrote any of his judgments. Lord Brougham, who succeeded Lyndhurst, did write many of his judgments, and probably was the earliest Lord Chancellor of the nineteenth century that did so. This writing of his judgments was made necessary by his ignorance of equity when he became Chancellor. Lord Cottenham's first Chancellorship was the most active of judgment-writing periods, but it could never be a precedent for any successor. The enormous pressure of different kinds of business upon him (arising from his immense judicial reputation), and the vast size of the written proceedings in every great Chancery cause of those times, obliged him annually to reserve at least a score of sets of files, for consideration in the Long Vacation. He would then read them

entirely through when almost forgotten, but with the assistance of his own notes of the argument. His plan was to get up the whole case and its law, and then to write off his judgment at a burst; then to take up another case, and another, till all were disposed of; and then, finally, to give each of them a re-reading and touching up before delivery. When a judgment had been read out in Court, the actual MS. was sent by his secretaries to Mylne and myself. He forbade us to let anyone see it; but this was not with a view to his subsequently correcting his judgment, as later judges did, for we never once gave him an opportunity of doing that. In Lord Lyndhurst's third Chancellorship (1841-1846) I was a great deal in his Court, and I found that he scarcely ever wrote his judgments. I believe that Lord Truro (1850-1852) wrote his judgments; but his whole procedure was of the most laborious and elaborate kind, with an all but invariable postponement of judgment, and with a 'gentleman at large' specially employed to get up his Chancery law for him. In Lord St. Leonards's brief Chancellorship in 1852, I believe his judgments were given orally at the end of the argument. All that I was concerned in were certainly so given. Lord Cranworth's judgments as Chancellor (1853-1858) were given sometimes orally and sometimes in writing. I sometimes wished that he had not disposed, orally and off-hand, of cases in which (having been away for eleven years at common law) he showed that he had forgotten some rules of equity, whereof we had forborne to remind him, lest he should be offended. Then came Lord Chelmsford and Lord Campbell; each of whom, when he sat alone, often was compelled to write his judgment in consequence of his want of previous equity knowledge.

COURTNEY KENNY.

(To be continued.)

RECENT THEORIES OF THE STATE.

TO every lawyer who regards his great profession as anything beyond the means of providing himself with a livelihood, the State must always be a subject of profound interest. For, though the narrow conception of Law (*i.e.*, lawyer's law), as the creature of the State, has finally crumbled before the vigorous criticism of the historical school, reinforced by the philosophical analysis of such writers as Duguit[1] and Durkheim,[2] yet there is complete agreement among all thinkers, that Law and the State are inseparably intertwined, if not as cause and effect, at least as inevitable concurrents in the stream of political and social evolution. If we no longer believe that, in Hobbes' words, 'Law is to every subject, those rules which the Commonwealth hath commanded him'[3]; yet we can hardly withhold our assent from the more modest definition of Blackstone, that Law is 'a rule of conduct enforced by the State.'[4] And lawyers may, with legitimate pride, claim that Blackstone, who, as a philosopher, was immeasurably inferior to Hobbes, was yet, on his own chosen ground, able to effect an improvement on his great predecessor's conclusions, which every fresh development of juristic thought has tended to justify.

But there is another reason why the lawyer who takes a real pride in his profession should be interested in a consideration of the nature and functions of the State. It can scarcely be denied, that the lawyer, as lawyer, is hardly a popular figure in the national imagination. Whether the criticism implied in this judgment is justified, may well be an arguable question. The student of history is not likely to undervalue the immense services rendered to the community by such lawyers (to take only a few names at random) as Sir Thomas More, Francis Bacon, Lord Hardwicke, Jeremy Bentham, and Sir Samuel Romilly. But, if our critics were to appeal from the rational judgment of professed historians to the more impressive verdict of national literature, we should, as members of a profession typified in the popular mind by the figures of Mr. Sampson

[1] 'Traité de Droit Constitutionnel.' Paris: Boccard. 1921—6 (5 vols.).
[2] 'De la Division du Travail Social.' Paris: Alcan. 1893 (ed. 1926).
[3] 'Leviathan,' chap. xxvi (ed. Bowring, III, p. 251).
[4] 'Commentaries,' I, Introduction, § 2.

Brass, Serjeant Stryver, or even Mr. Tulkinghorn, contrast somewhat painfully with the idyllic pictures of the 'beloved physician,' Dr. Goodenough, or the unworldly Vicar of Wakefield.[5] The point is not, whether the popular judgment is just, but whether it does not restrict the potential value to the community of those services which lawyers are so capable of rendering, if they are permitted and qualified to do so. The fact that lawyers manage, on the whole, to get at least their fair share of the plums of the social pudding is, also, *nihil ad rem*; for it will be generally agreed that individual success (in the ordinary acceptation of the term) is no guarantee of social esteem or value.

It might seem to be a far cry from the unpopularity of lawyers with the general public to the mysteries of scientific jurisprudence; and yet it is not fantastic to suggest, that there is one feature in the scheme of juristic conceptions until recently accepted by the average English lawyer, which did something to explain that unpopularity. The special political attitude of Hobbes, accidentally strengthened by the peculiar circumstances of English history (the case was by no means the same in Scotland or Ireland), and sharpened by the further accident that Austin, the great exponent of the Hobbesian philosophy in the realm of jurisprudence, had, during his most impressionable years, been a subaltern in a Line regiment, contrived, most unfortunately, to exalt, in English juristic thinking of the nineteenth century, that peculiar feature of the State which is merely its *differentia*, or distinguishing mark, into a position which not only completely distorted the true character of the State, but tended to make it, as well as the theory upon which, according to the English jurists, it rested, intensely unpopular. This theory, it need hardly be said, was the doctrine of Sovereignty, as expounded by the Austinian school of jurists. Force (*i.e.*, physical force), when applied to human beings,[6] is rarely a popular agency, except, perhaps, with those to whom its application is entrusted. Moreover, its effectiveness is severely limited. It is, no doubt, given certain conditions, effective in repressing disorder and defending the community against external attack; and these are great services,

[5] Incidentally it may be pointed out that the Hebrew Scriptures indicate a similar attitude on the part of a community wholly different from the British. The best thing that the Bible has to say about lawyers is, apparently, that they are no worse than theologians.

[6] The application of physical force to inanimate objects is, of course, essential to civilization as we understand it, from the building of a bridge to the making of a needle.

which a wise use of physical force may render. But, for constructive or productive purposes (and here is the grand mistake of the Marxian school as at present operative in practice) it is practically useless. Force, in other words, is, so far as its application to human beings is concerned, inhibitive only, not creative. Moreover, it can control conduct only, not thought.[7] Therefore, a theory, which, like the orthodox Austinian theory of sovereignty, pictured the State, the source of law, as an omniscient, omnipotent deity, wielding a power indivisible, illimitable, unquestionable, and without human feelings, with lawyers as its ministering spirits, was hardly likely to create a favourable impression upon the minds of the masses who had no direct access to the shrine of the deity, or share in the direction of its force. Even when this latter grievance was to a great extent removed by the extension of the political franchise, the essential immorality of the conception was hardly diminished—it became merely a question of who was to profit by the immorality. Finally, the preposterous exaggeration of the picture which appeared in the writings of the German publicists of the Bismarckian age, intoxicated with the doctrines of Hegel and Fichte, in which the State figured as a kind of Moloch, demanding from its subjects blind obedience and worship, and the ruthless sacrifice of all individual interests, rendered the theory of State-Sovereignty still more odious in the eyes of humane and reasonable men—so odious, in fact, that it has become almost the chief task of post-war jurists to demonstrate the fallacy of the conception. Evidently, this task can best be achieved by a careful study of the history, structure, and essential nature of the State.

Therefore we welcome, with peculiar satisfaction, Professor MacIver's new book, 'The Modern State.'[8] Many of us who recall the dark days of the year 1917, when it seemed almost inevitable to despair of the future of civilization, will remember with gratitude the appearance of Professor MacIver's earlier work, 'Community: A Sociological Study,'[9] which, with its freshness of thought, its clarity of reasoning, and the ease with which its argument moved among the elusive phenomena of social life, brought real refreshment of spirit, and revived hopes

[7] A humorous instance of a failure to appreciate this fact is the story told of a famous Eton head master, whose belief in the efficacy of corporal chastisement was the chief article of his educational creed. 'Boys,' cried he, in the course of a sermon, 'the Good Book says, "Be ye pure in heart." Boys, if y'aint pure in heart, I'll flog ye.'

[8] Oxford: at the Clarendon Press, 1926.

[9] Macmillan & Co., 1917.

that had almost died away in the agonies of that terrible year. If the new production of Professor MacIver's pen has not quite the originality and sweep of his earlier, that is mainly because his earlier work laid so surely the foundations of his philosophy, that his later seems to follow logically from it, and thus to contain less of the delightful element of surprise. But it is no less successful in its way. In 1917, we had the brilliant skirmishing attack of a young and almost unknown leader upon the fortresses of superstition and dogma. Now we have the orderly march of the experienced general, laying down roads, bringing up artillery and ammunition trains, making good each new step of advance, leaving nothing to chance. In other words, we saw in 1917 a brilliantly suggestive essay; to-day we have an almost ideal university text-book, classical in style yet lightened by the same happy felicity of phrase which marked Professor MacIver's first work, manifestly the product of wide study and prolonged thought, philosophical in tone yet definite and authoritative, as becomes a teacher of established position addressing students of his subject, compact, orderly, and dignified. We congratulate the young man or woman who approaches the study of political science or jurisprudence through the pages of this book.

One of the chief merits, perhaps the main object, of Professor MacIver's earlier work, is, that it analyses and distinguishes between a considerable number of what ought to be scientific terms, but which, in fact, are used by careless or superficial writers and speakers as alternatives, the choice of which, in any particular passage, may be determined by the fancy of the moment or the claims of euphony. Fielding and other eighteenth-century novelists very happily satirized this kind of mental confusion in many well-known passages [1]; but it is to be feared that they did not succeed in eradicating it. Such words as 'nation,' 'community,' 'State,' 'society,' 'association,' 'institution,' and the like, appear, not only in the speeches of Parliamentary and platform orators, but in treatises of greater pretensions, to be used, more or less, as equivalents. Needless to say, the resulting confusion of thought is appalling. For, in thus juggling with words, the speaker or writer is really playing fast and loose with concepts which are of the very essence of his subject, and which, whether or no they can be formed without the aid of language, can certainly never be expressed

[1] A typical example is the passage put into the mouth of the surgeon who attends Tom Jones after his unfortunate collision with the bottle flung by Ensign Northerton ('Tom Jones,' Bk. VII, chap. xiii).

without it. And to the superficial critics who dismiss efforts of this kind with the contemptuous description of them as 'logomachies,' or battles about 'mere words,' we may recommend the perusal of those fascinating chapters of the work of that truly great psychologist, the late G. J. Romanes, in which he traces the evolution of language from the earliest efforts of the human consciousness to express its meaning.[2] Wherefore, though by no means prepared to admit the adequacy of the dictum of John Stuart Mill, that 'a well-made lexicon of the legal terms of all systems would be a complete science of jurisprudence,'[3] we are profoundly grateful to Professor MacIver for his careful and accurate diagnosis of the meaning of the fundamental terms of the social sciences.

Upon this encomium we must, however, regretfully impose one qualification; and it is curious that it should imply a difference of opinion on the very subject of Professor MacIver's book. Happily, we believe the difference to be one of terminology rather than of thought. But we think it unfortunate that, in his more mature work, Professor MacIver should have clung to a definition of the State as an 'association,' to which, perhaps without complete apprehension of the consequences, he committed himself in his earlier book. An 'association' is defined in that book,[4] as 'an organization of social beings'; and it will be generally agreed that an 'association' implies members, who must be 'persons,' natural or moral. Now we are entirely with Professor MacIver on the historical truth that the earliest form of the State was an 'association,' *e.g.*, of the host-leader, or king, and his war-band; and we think that Professor MacIver has done good service to the cause of clear thinking, by pointing out[5] that the rudiments of the State are to be found rather in privileged persons than in 'rulers,' and that the researches of anthropologists like Sir James Frazer[6] into the effect upon the primitive mind of 'taboos' and other symbols of sanctity, are invaluable aids to a right understanding of the psychological history of the State, and, indeed, of political authority generally. But it seems to us clear that, in the evolution of ideas, the State has, in the case of a highly-developed community such as the modern civilized nation, ceased to be, or to be regarded as, a body of persons, and has become that abstract entity which

[2] 'Mental Evolution in Man.' London: Kegan Paul. 1888 (see chaps. xii—xv).
[3] 'Dissertations and Discussions,' vol. III, p. 213 (review of 'Austin on Jurisprudence').
[4] 'Community,' p. 23.
[5] 'The Modern State,' p. 40.
[6] In 'The Golden Bough' (*passim*), esp. vol. I, chap. vi, and vol. III, chap. i.

we term an 'institution,' *i.e.*, as Professor MacIver well puts it,[7] a form of relations between social beings established as a means to achieve certain objects. The difference is vital; and it is for a want of appreciation of it that the Marxian theory of the 'Class State' is, like so many Marxian theories, out of date in the stage of development reached by the modern industrial community. Marx, as Professor MacIver himself points out,[8] was apt to 'interpret modern situations in mediaeval conceptions'; and to that fact, as the Master of Balliol, in his admirable little summary and criticism of the Marxian philosophy,[9] indicates, are due most of the fallacies of the Marxian conclusions. The real reason why revolutions of the kind prophesied by Marx are unlikely to happen in highly-developed communities, though they are likely enough in communities of the undeveloped Russian type, is just that, with the widening of the electoral franchise, the association, which, at one time, undoubtedly constituted the State, has ceased to have a *raison d'être*, because it has become practically co-extensive with the nation. But the idea, or concept, which the association created, remains, and is of the more value to society, that it is no longer regarded as the possession of a privileged class. Consequently, its functions and claims, as an objective institution, or piece of social machinery,[1] can be rationally and calmly discussed, without any of the passion or prejudice which inevitably attends the criticism of persons. Professor MacIver himself appears to be on the point of reaching this conclusion, when he speaks of the State as 'not a πόλις, but a special aspect of it which gradually separated itself,'[2] or when he says,[3] that the State 'has the essential character of a corporation,' which is, of course, an institution.

But, if we are reluctantly compelled to differ from Professor MacIver in his definition of the State, we are whole-heartedly with him in almost every other part of his work. Particularly do we agree with his view of the historical evolution of the State, not from, but in opposition to, the older kin-group; and, naturally, the more so because it follows the lines sketched by us many years ago. We envy Professor MacIver his happy

[7] 'Community,' p. 151. See also 'The Modern State,' p. 5 ('recognized modes in which communities and associations regulate their activities').
[8] 'The Modern State,' p. 403.
[9] 'Karl Marx's Capital.' London: Oxford University Press. 1925. (See especially chap. v, and the instructive comparison of Rousseau and Marx.)
[1] Professor MacIver well indicates the danger of calling the State an 'organism' ('Community,' pp. 70—86).
[2] 'Community,' p. 228.
[3] 'The Modern State,' p. 479.

knack of crystallizing into a memorable phrase a process which a clumsier writer would have taken pages to explain. 'Kin-relationship is, as it were, a time-bracket, and the political relationship a space-bracket.'[4] In other words, though there is a definite relationship between the State (based on territory) and the family (based on descent), it is not that of child and parent; and the talk which one sometimes hears about the State being an 'enlarged family' is either pure 'tosh,' or at best the result of confused thinking. Just as the State could not do its work properly if it imitated the ethics and the methods of the family, so could not the family work satisfactorily if it imitated the methods of the State, and set itself to achieve the objects for which the State exists.

We are full, also, of admiration for the manner in which Professor MacIver unfolds the later development of the State idea, through the Oriental Empires to the beginnings of the State in the Hellenic civilization of Eastern Europe and the Mediterranean, down to the fall of the Roman Empire, through the feudal period, to the appearance of the National State, based originally on Machiavellian conceptions, but profoundly modified by later events. And we may call particular attention to a brilliant passage[5] in which he explains the importance, in this connexion, of the development of the citizen-type of character in Greece.

If we turn from the descriptive to the philosophical side of Professor MacIver's work, we are equally impressed. In his determined attack on the dogma of Sovereignty, he is, of course, not a pioneer. But it is seldom (so far as our knowledge goes) that the attack has been developed with such force, or with such a wealth of argument to support it. Starting from the historical standpoint, Professor MacIver has little difficulty in showing that the 'universal partnership' which is the philosophical form of the crude military theory of sovereignty,[6] is merely the expression of the atmosphere of a primitive, undifferentiated community, in which specialization is unknown. Suitable, or at least plausible, for the tiny communities of Greece and early Italy, it broke down hopelessly before the altered conditions of the great Territorial State, with the dire result that the Roman Empire fell because its thinkers and statesmen failed to discover a sounder principle of social organization. Slowly and pain-

[4] 'The Modern State,' p. 27.
[5] Op. cit., p. 72.
[6] It is highly significant that it appears again in Bolshevism (see *post*, p. 200, n. 1.).

fully, through the tentative ' federalism ' of Althusius,[6a] through the narrow and prejudiced doctrine of *laissez-faire*, down to the exponent of a false antithesis (*Man versus The State*), Professor MacIver traces the struggle to find a true principle for the circumscription of the orbit of the State; and he finds it, not in *force*, but in *function*. What the State can do effectively, that is its proper sphere of action, and no other. And, as it is perfectly plain that there are many things which the State cannot do, because physical force, which is its peculiar weapon, and its *differentia*, is incapable of doing them,[7] so the doctrine of Sovereignty is a monstrous perversion of facts, and is almost as harmful in the internal polity of a nation as it is mischievous in the sphere of international relations. Without going quite so far as to accept it as a complete solution of practical difficulties, Professor MacIver is, apparently, inclined to adopt the famous pronouncement of T. H. Green, that the State should only, if it is true to its own nature, enforce those acts (and the doctrine is equally true of forbearances) the doing of (or abstention from) which, *from whatever motive*, is necessary for the good life within society.[8] But he naturally admits, that the application of this principle must vary from age to age, and from circumstance to circumstance.

We regret that limits of space forbid us to do more than refer to the other parts of Professor MacIver's admirable book, *e.g.* his study of the nature of law,[9] in which he steers, with almost complete success, amongst technical pitfalls,[1] and his happy

[6a] For a good summary of the too little known work of Althusius, see Gierke, ' Johannes Althusius,' Breslau : Koebner, 1880.

[7] ' The State orders life, but does not create it ' (' The Modern State,' p. 162). Of course it is not contended that the State acts *only* by force. But a peculiarly instructive illustration of the limitations which the ' force atmosphere ' of the State imposes on its usefulness was the step taken by the British Government in 1921, of transferring the administration of the Protectorates and new Mandated Territories from the Foreign to the Colonial Office, with, it is to be feared, deplorable effects on Continental public opinion. The Foreign Office is, of course, of all Departments, mostly deeply imbued with the spirit of the *Macht-Staat*; and apparently, it insisted on treating the Protectorates and Mandated Territories as conquests, or, at least, as potential enemies. The Colonial Office, a much more modern institution, will, it is to be hoped, prove more flexible.

[8] ' Principles of Political Obligation,' MacIver, op. cit., pp. 470-1.

[9] ' The Modern State,' chap. viii.

[1] We rather suspect that one of Professor MacIver's seeming slips is due to a misprint. On p. 265 of his book he speaks of ' any corporate or incorporate body.' Now to a lawyer, and, we think, also to most laymen, ' corporate ' and ' incorporate ' are synonymous. The usual contrast is ' corporate or unincorporate.' And, *pace* both Lord Balfour (' I am talking common sense, not law ') and Professor MacIver, the objection to the Taff Vale decision is, not that it imposed a liability for the torts of their members on Trade Unions, but on Trade Unions *only*, out of a host of other unincorporated bodies, *i.e.* it was class legislation. Moreover, we are not at all sure that ' a corporation, as such, cannot commit a criminal offence ' (p. 473). What about *R.* v. *Ascanio Puck & Co.* (1912) 29 T. L. R. 11?

comparison of the famous 'Rule of Law' with Kant's hardly less famous 'categorical imperative': his classification[2] of the forms assumed by the State, which is refreshingly modern and entirely free from antiquarian prejudices of no real importance[3]; and his interesting analysis[4] of the process of formation of political parties within the State, and the methods by which they function. We can, in fact, do no more than allude here to one other part of his work, in which he has treated a long-established (and demolished) theory of the origin of society.

It is a commonplace, of course, that the Social Contract Theory has no historical foundation, whether it is stated in the terms of Hobbes, of Locke, or of Rousseau. Put quite shortly, the objection to it is, that it is not only unsupported by evidence, but that it is logically unthinkable, because it assumes that the consequences of an act can be the causes which produced it. We need not waste time in slaying the slain.

But Professor MacIver will not even admit the 'confession and avoidance' of Whewell, who pleads[5] that this theory, though devoid of historical justification, may be 'a convenient form for the expression of moral truths.' On the contrary, he regards it as a mischievous doctrine, implicitly based on a wholly false conception of the nature of Man. The alleged antithesis between individualism and socialism is radically unsound: because there is not, and never has been, a wholly individual human being, *i.e.* a man whose mental and physical make-up is completely uninfluenced by the existence of his fellows. After a polite but severe criticism of Mill's 'Essay on Liberty,'[6] which he condemns as 'confusing individualism with individuality' and treating liberty as an end in itself instead of a means to an end—viz. the realization of a better life, our author proceeds to show how the whole conception of the Social Contract rests on the false assumption that the individual is anterior to society, in spite of the obvious fact that every human being is necessarily the product of social intercourse.' At the same time, Professor MacIver admits (as, indeed, in the face of facts, he could not well deny) that 'the State may well be, but society can never be, interpreted as a contractual fabric'[8]: for

[2] 'The Modern State,' chap. xii.
[3] As, for example, the Swinburnean devotion to a 'Republic.'
[4] Op. cit., chap. xiii.
[5] 'Elements of Morality,' second ed., par. 827. Cambridge: Deighton, Bell & Co. 1864.
[6] 'The Modern State,' pp. 456—60.
[7] Needless to say, this is a point on which Rationalism and Bolshevism are at one (see 'Historical Materialism,' p. 93).
[8] 'The Modern State,' p. 445.

the existence of the Swiss and the American Republics—and, indeed, political federalism generally—can hardly be denied a contractual basis. Nevertheless, it is a profound truth which he urges,[9] that 'socialization and individualization are the two sides of a single process,' which goes on (or should go on) continually towards the evolution of the better Man. And his chief indictment against the doctrine of the State-worshippers of the Hegelian School is, that Hegelianism tends towards the begetting of the fatal fallacy that 'it is possible to work for humanity otherwise than by working for men.'[1]

It is a striking tribute to the profundity of the work of Charles Darwin, that it produced, almost immediately,[2] two thinkers of such widely opposite character and tendencies, but almost equally powerful influence, as Sir Henry Maine and Karl Marx. Maine, the founder of the English school of historical jurisprudence, was gradually led by his application of Darwinian ideas to primitive institutions (perhaps not uninfluenced by his experience as an Indian administrator) to an impressive but rather narrow conservative conclusion. Marx, who openly avowed his indebtedness to Darwin, was led by his investigations into economic origins (again not entirely uninfluenced by his personal experiences) to revolutionary communism. We deal here only with Marx, whose doctrines have recently been set forth in modern form, as well as applied in actual practice, by Nikolai Bukharin, in his 'Historical Materialism, a System of Sociology,' an 'authorised' (American) translation of which, from the third Russian edition, has recently been published in this country.[3] Comrade Bukharin, as is well known, is a prominent actor in the grim tragedy now being played out in Russia; and his work may fairly be claimed to be an authoritative exposition, for which we have long waited, of the principles of Bolshevism. Despite the crudity of many of its missionaries, it is, we fear, unhappily, impossible to dispose of a system which bulks so largely in the world of to-day, solely by the solvent of

[9] 'Community,' p. 214.

[1] 'The Modern State,' p. 453.

[2] The dates are extremely significant. 'Origin of Species' (1859), 'Ancient Law' (1861), 'Das Kapital' (1867). Of course Darwin had forerunners (and even rivals); but his was the 'seminal mind.' If it is claimed that Marx had, before the appearance of his larger book, published the essence of his theories in his and Engels' 'Manifest der Kommunisten' (1849), *i.e.* before the appearance of 'The Origin of Species,' the answer is, that so had Darwin, in his celebrated essay of 1842, 'Foundations of the Origin of Species.' An English translation of the 'Manifest' was published in 1888, with notes by Engels (London: William Reeves). If a non-scientific person may venture to offer a suggestion to scientific workers, it is that they appear to pay too much attention to the origin of species, and too little to its consequences.

[3] London: George Allen & Unwin. 1926.

laughter. Mr. A. P. Herbert has, on many occasions, contributed by his pen to the gaiety of his English readers; and for that we owe him thanks. But his well-known letter to *The Times*,[4] delightful as it is, can hardly be taken as a complete answer to the claims of 'scientific communism'; and it is necessary to resort to more prosaic methods.

We may begin, perhaps, by raising three preliminary objections to the controversial methods of the Marxian school, including those of its founder himself.

In the first place, we may ask whether it is necessary that a treatise on social organization should begin with a laborious and pedantic exposition of Hegelian dialectic (thesis, antithesis, synthesis, etc.), doubtful theories of cosmogony, a discussion of the age-old problem of determinism and free will, and the like. Such an apparatus betrays its Teutonic origin,[5] and it suggests the well-known methods of the cuttle-fish rather than the dry light which should accompany scientific investigation. 'Mind does not appear until we already have *matter organized in a certain manner*,' says Comrade Bukharin, dogmatically, with all the emphasis of italics.[6] To which we may well reply: 'Then who, or what, organizes it?' Such dogmas do not lead us very far; and in any case, appear to be irrelevant to a discussion of the subject in hand.

In the second place, despite their scorn of 'teleological fallacies,'[7] the Marxians are as bitter as any of the heresy-hunters in their rancour against those sects which happen to differ from them in the finer shades of doctrine. Social Democrats, Guild-Socialists, Syndicalists, Anarchist-Communists, are the objects of almost fiercer denunciation than that which they pour upon the natural enemy. Marx wrote a whole volume of abuse of the unfortunate Proudhon,[8] whose famous epigram ('property is robbery') ought, one would have thought, to have secured him a place in the communist Walhalla. That is the true note of the fanatic. Nor does their wrath confine itself to abuse, as witness the fates of Alexander Berkman,[9] and the gentle and saint-like Peter Kropotkin, who had spent a long life in the cause of

[4] Jan. 12, 1927.

[5] It may be compared with the 'male' State of Bluntschli ('Lehre vom modernen Staat') and the 'seasonal development' of Spengler ('Unter-gang des Abendlandes'). Bluntschli, it is true, was a Swiss; but he was a German-Swiss. Apparently we owe to Marx the 'shining armor' of the ex-Kaiser ('Historical Materialism,' p. 257, quoting from the New York *Tribune* of February 2, 1854).

[6] Op. cit., p. 55.

[7] 'Historical Materialism,' p. 24.

[8] 'La Misère de la Philosophie' (trans., Quelch, Chicago, 1910).

[9] Recounted in his 'Bolshevist Myth.' London: Hutchinson. 1925. For Kropotkin's fate, see chap. x.

communism, and sacrificed for it far more than most of his critics. In one case, at least, Comrade Bukharin takes pains to explain that a certain doctrine which he holds is 'orthodox.' [1] What on earth does it matter, in a professedly scientific treatise, whether or not a doctrine is 'orthodox'? The question is, whether it is true.

Closely allied with this essentially unscientific attitude, is the typical weapon of Bolshevist writers and orators, the violent abuse of those who have the misfortune to differ from their views. 'Clap-trap,' 'Philistine,' the 'drooling' of the 'senile bourgeoisie,' 'tomfoolery,' 'poor wretches' (modern economists generally), 'protagonist of pogroms' (surely a dangerous phrase on Bolshevist lips), 'impudent' (Hans Delbrück), 'moldy old men' (who like Church hymns)—these are some of the flowers of a 'scientific treatise.' Doubtless, this sort of thing is part of the fighting technique of the Bolshevist advocate; and, like the *Schrecklikeit* of a kindred régime, it fails of its intended effect on serious readers, just as the murder of Edith Cavell had quite a different effect from that anticipated by its perpetrators. Probably both are really due to what Freud would call an 'inferiority complex,' and, while they may, perhaps, encourage timid supporters, are of little use in affecting serious opponents. When this style of approach is adopted, and when the argument which it is intended to support leads to conclusions apparently opposed to common sense and experience, the wary critic usually looks for a fundamental defect in its premises; and, in this case, his search will not be in vain.

In sober truth, and it is a point which should not be overlooked, what gave Marx's famous treatise its real start in life was not its repulsive style, nor its pedantic theories of 'labour power,' with their pseudo-algebraic formulae, but its carefully chosen and edited extracts from the Reports of the early English Factory Inspectors, which not even the latest astounding attempt of the survivors of the Laissez-Faire School to whitewash, as mere pictures of the universal morality of the eighteenth century, can remove from the pages of English economic history. These did, indeed, contain a tremendous warning against the evils of an industrial scheme of unrestricted competition, with its motto of 'each for himself and the Devil take the hindmost.' No patriotic Englishman can read those Reports without a burning sense of shame and indignation; and it is no good answer to point to similar conditions in Bolshevist

[1] 'Historical Materialism,' p. 260.

Russia of to-day. It is a better answer to point out that England, with her benighted capitalist system, had, under the inspiring influence of men like Shaftesbury, Fielden, and the elder Peel, long before Marx wrote, steadily set her face against such a monstrous abuse of 'freedom of contract,' and has, since his day, through her Factory and Workshop Acts, her efficient system of factory inspection, her Workmen's Compensation Acts, her Minimum Wage Acts, and her schemes of National Insurance, done much to redeem herself from her past neglect of the weaker members of the community. In this connexion, and in the kindred struggle for sanitary reform, the State, as a powerful engine of the national will, has played no mean part. But (and here we approach the issue of the Marxian doctrine) the happy results to which the social reformer in England can point have not been due to the revolutionary agency of a communist despotism, but to the earnest advocacy of devoted men and women, who have laboured incessantly to arouse the national conscience and create a wholesome public opinion. This difference goes to the root of the matter.

For, to put it shortly, the germ of truth in the teaching of Marx and his followers has been magnified and distorted by a grotesque want of balance and proportion; and their whole 'philosophic' attitude is demonstrably unsound.

The germ of truth in the Marxian philosophy is the insistence on the close connexion between economic conditions and the legal doctrines in which the will of the State (which, as Professor MacIver points out, is not the same thing as the will *for* the State) is expressed. This was hardly a discovery, even in 1867. No student of English history could have failed to notice, for example, the intimate connexion between the famous clause of the Statute of Merton [2] on the enclosure of manorial wastes and the economic doctrine of the 'unearned increment,' or between the gradual evolution of the theory of the simple contract in the sixteenth and seventeenth, and the tremendous use made of it by the pioneers of the Industrial Revolution in the late eighteenth and early nineteenth centuries.[3] Which was the cause and which was the consequence, is a difficult question

[2] 20 Hen. III (1238) c. 4. 'Their' manors. Even the accidental use of a few words may have a profound effect in determining economic conditions. A history of the evolution of property in England might be written round the possessive pronoun.

[3] Professor Holdsworth, in his recent article in the opening number of the 'Economic History Review,' pp. 114—123, has well illustrated a few of the minor examples of this connexion. But we do not think that Dr. Holdsworth would care to be ranked as a Bolshevist.

to decide; but the problem is one of the most important in political science.

The fact is, that the Marxian scheme of the Class State,[3a] with its simple dichotomy of the community into two mutually exclusive classes, locked in an internecine struggle, of 'capitalist' (or 'bourgeois') and 'proletariat,' is, even if it ever corresponded with facts, hopelessly out of date. Owing to Comrade Bukharin's discreet avoidance of definitions, we are somewhat at a loss to know whether a 'bourgeois' is anything more than a person whom Comrade Bukharin happens to dislike.[4] But, using our best care to discover his meaning from a number of somewhat inconsistent passages,[5] we seem to find that a 'capitalist' is a direct employer of labour, whilst everyone who is not is a 'proletarian,' a person condemned to hopeless 'wage-slavery' under the lash of a class which has succeeded in monopolizing the whole of the means of production. This kind of thing, however true a picture it may be of present-day Russia, strikes one as being a very fancy sketch of, for example, Great Britain, whose 'proletariat' has, within the last ten years, invested some £730,000,000 in National Savings Certificates and deposited almost as much in Savings Banks, or of the United States, where the fifty-dollar-a-week artizan, going off on a well-earned jaunt in his own motor-car, is a common object of the seashore. We believe that, without arrogance, we could claim to produce a truer analysis of enonomic divisions in a modern industrial community; but such an attempt would extend this review beyond a reasonable length, and may be reserved for an Appendix.[6] Meanwhile, we should be glad to have from Comrade Bukharin a simple explanation of the essential difference of the transactions, when a prosperous artizan's wife 'purchases labor-power' in the market[7] by

[3a] A learned friend has suggested to us that the theory of the Class State may have been taken by Marx from an article attributed to James Mill in the fourth number of the 'Westminster Review,' pp. 503—553 (1824).

[4] For example, the peasant, who seems to hover uncertainly on the borders of the two classes, and, by a curious rule of the Marxian game, to be used as a pawn on either side as occasion requires (see 'Historical Materialism,' p. 286). If personal impressions are to determine social types, one might class Marx himself as a 'bourgeois.' At any rate, his portrait, reproduced at the beginning of the Master of Balliol's little book, is that of the typical 'bourgeois'—beard, frock-coat, starched shirt-front, and massive figure, complete.

[5] Perhaps the fairest passage to quote is that on p. 282 of 'Historical Materialism': 'On the one hand, the class which commands, monopolizing the instruments of production; on the other hand, the executing class, with no means of production, which works for the former.' This, substantially, agrees with Engels' footnote on p. 7 of the 1888 translation of the 'Manifest der Kommunisten,' before alluded to.

[6] See Note A at end of this article.

[7] 'Historical Materialism,' p. 282.

ordering a new hat in her favourite store, and when a struggling hairdresser engages a new hand to help him in his shop. We are entirely with Herr Marx and his followers in their contention that all properly-directed labour (mental as well as manual) has a social value, and, therefore, that the community is justified in taking toll of its results in taxation which goes towards the development of public utilities and social betterment generally. But we fail to see how, without enormous waste and friction, the bulk of its products can be utilized except by distribution among individuals. And we must be pardoned for thinking, that such distribution is more satisfactorily effected by the flexible operation of the open market (which, with all its faults, is fairly representative of the desires and habits of the ordinary man) than it would be by a system of rationing administered on rigid lines by an all-powerful State. And what is true of distribution in this respect is, of course, equally if not more, true of production, for reasons above given.[8]

Admirable indeed, in contrast with the wild dreams of the Marxian school, are the sober comments of Professor MacIver and the Master of Balliol on the important subject of the relations between the State and the economic order. In his valuable chapter on the subject,[9] the former points out how, and why, the undifferentiated primitive community, in which religion, military activity, economic order, the administration of justice, and legislation, are united in a single authority, has given place to a highly elaborate 'eccentricity of power,' in which these functions are entrusted to different hands, and administered by different methods. The political authority (the State) remains formally the superior; because it is needed, as the 'hoops of the barrel' (the phrase, oddly enough, is Bukharin's [1]), to bind together all the staves. But, as Professor MacIver admirably puts it: 'the intrinsic character of economic power is such, that it cannot, by any manipulation of control, be made to coincide with political power'; for 'it has a singleness and concentration of aim which political power can hardly achieve.' [2] In sober fact (though Professor MacIver does not put it that way), the energy and inventiveness which are the very life-blood of successful industry would be, not merely a

[8] *Ante*, p. 188.
[9] 'The Modern State,' chap. ix.
[1] 'Historical Materialism,' p. 131. But Bukharin, in his definition of the State as the organization of all society,' differs profoundly from MacIver, to whom it is the 'organization of citizenship.' With the latter, 'the final unity lies in the solidarity of men, not in the power of the State' ('The Modern State,' p. 482).
[2] 'The Modern State,' pp. 292—3.

nuisance, but a positive danger, if displayed in connexion with the State's peculiar weapon of physical force. The citizen can ignore, or argue with, an over-enterprising tradesman; he cannot thus treat a force-wielding State. We strongly suspect that 'primitive communism,' if it existed, or exists, at all, is much more in the nature of a concentration of authority than of a community of enjoyment. But such a concentration would be disastrous to the rich and varied life of a modern nation; and the Marxian ideal, as it appears in practice, is, in fact, a 'reversion to type' of a thoroughly reactionary kind.

That is why the despised 'bourgeois' devices of political representation, federal organization, Parliamentary Executives, the 'Rule of Law,'[3] and the Referendum, in the political sphere, co-operation, profit-sharing, and 'Whitley Councils' in the economic, and liberty of conscience and worship in the religious, upon which the Marxian writers pour scorn, are, however incomplete, more valuable, as guides to the future, than the unified despotism of the U.S.S.R. They are honest, if imperfect, attempts, by the sound method of inductive experiment, to achieve the ideal of the better life, and for this purpose are far more hopeful for the future of humanity than the ruthless and visionary methods of the Marxian school, which would see a world in ruins sooner than that one jot or tittle of their creed should not be put into effect; and the results already achieved by them[4] will certainly bear favourable comparison, even from the 'proletarian' standpoint, with the results achieved by the Marxian gospel in Russia. Against the glowing accounts of Russian prosperity set forth in the 'Soviet Union Year Book,'[5] avowedly prepared for foreign consumption, the careful observer will not fail to set the detailed observations of Professor Karlgren, whose recent work, 'Bolshevist Russia,'[6] is founded on close personal study of Russia as she really is, and

[3] It is particularly noteworthy that this great principle, in which England has led the way (though she has recently fallen rather behind on the march), is openly scouted by the Soviet Civil Code, according to which all so-called judicial decisions and applications of legal rules are to be subject entirely to the point of view of the 'interests of the State.' (See an interesting article by M. Tager, 'Le Régime successoral dans le Droit Soviétique,' in the Bulletin Mensuel de la Société de Législation Comparée for Oct.—Dec., 1926, pp. 531—558.)

[4] See the interesting study of recent economic development in England by Messrs. Bowley and Stamp, 'The National Income, 1924.' Oxford: Clarendon Press. 1927.

[5] By Segal and Santalov. London: George Allen & Unwin. 1926.

[6] Trans., Barwell, London: same publshers. 1927. Apparently, the only appreciable gains won by the 'proletariat' are (1) the feeling of satisfaction in 'downing' the hated 'bourgeoisie,' and (2) the pathetic belief in the imminence of 'world revolution.' And these 'spiritual' gains are confined to the urban proletariat, and offset by severe material losses.

the equally outspoken record of his experiences by Alexander Berkman,[7] before alluded to, who, as a convinced Communist, hastened to return to Soviet Russia as to the Promised Land, only to escape, at the peril of his life, after months of bitter disillusionment.

There is, in fact, no short cut to the Millennium; and there appears to be not much to choose between the Tsarist Okhrana and the Bolshevist Cheka, or between the Tsarist bureaucracy and the Soviet Komintern. *Plus ça change, plus c'est la même chose*—that is an observation which has more than once been truly made on the effect of violent revolutions.

In conclusion, we note, in the later pages of Comrade Bukharin's work, a very curious coyness in forecasting the probable development of institutions in Soviet Russia. In his earlier pages, he seems to look forward to a complete disappearance of 'class' distinctions, and the emergence of an idyllic society, in which all will work, consciously and without constraint, for a somewhat vague social ideal. 'There were no classes, for example, in the primitive communist society, nor will there be any in the communist society of the future.'[8] 'In such a society, all the relations of men will be obvious to each, and the social volition will be the *organization* of all their wills.'[9] Perhaps. But a closer acquaintance with obstinate human nature, to say nothing of the charms of power, appear to have modified Comrade Bukharin's views; and, in his closing pages, he is much more cautious in his political predictions. 'The party is simply the thing that best expresses the interests of the class.' And, even within this chosen (Bolshevist) party, there are inequalities; and so there must be leaders, 'who best express the proper tendencies of the party.'[1] Exactly. That is the justification of the ordinary vulgar *coup d'état*; but it is a strange argument in the mouths of the exponents of an ideal equalitarianism. And when, a little later, we get a reluctant admission of the possibility of the reappearance of a 'class germ' in communist society, we venture to doubt whether it can be safely left to be counteracted by the growth of productive forces and the abolition of educational monopoly.[2] For we take leave to question Comrade Bukharin's confident claim that 'communist society is a society with highly-developed increased productive forces'[3]; and we are equally sceptical of the exist-

[7] 'The Bolshevist Myth': *ib.*, Hutchinson. 1925.
[8] 'Historical Materialism,' p. 147.
[9] *Ibid.* p. 41.
[1] Op. cit., p. 305.
[2] *Ibid.* p. 311.
[3] *Ibid.* p. 310.

ence ' in the society of the future . . .' of ' a colossal over-production of organizers, which will nullify the stability of the ruling groups.' [4] It may be so; but, in the meanwhile, though they have had ten years in which to bring about this much-to-be-desired state of things, the ' ruling groups ' appear to be pretty steadily bent on maintaining that stability.

EDWARD JENKS.

APPENDIX.

SUGGESTED CLASSIFICATION ON MODERN LINES.

(See p. 199, *ante*.)

Nothing can be clearer than that the Marxian classification of the members of a modern industrial community is hopelessly out of date. The difficulties which a desperate attempt on the part of an orthodox follower to retain it involves may be seen in pp. 282-285 of Bukharin's book, where the sharp edges of the original dichotomy are blunted by the admission of indeterminate stages (' basic,' ' intermediate,' ' transition,' ' mixed,' ' *déclassé* '). With great diffidence, we suggest the following as an improvement.

1. *The Leisured Class.*—By far the largest in a typical modern industrial society like Great Britain or the United States. It consists of ' wage-earners ' in the broadest sense—*i.e.*, men and women who work for a fixed (or readily fixable) remuneration, usually in money. It includes the vast army of manual workers, clerks, managers, foremen, commercial travellers, school-teachers, Government (central and local) and corporation officials of all but the highest grades, parsons. Whilst undoubtedly comprising many strange bedfellows, it is marked by the strong common characteristics of (a) a fixed wage, usually just sufficient to maintain the recipient and his dependants in the modest state of comfort considered to be appropriate to his station; (b) fixed hours of work, not usually excessive in amount [1]; (c) absence of (to put it mildly) any burning enthusiasm for, or interest in, their work, and (d) ever-present fear of losing their ' job '—except in the favoured instances of Government officials, domestic servants, school-teachers, etc. The first two characteristics are by no means unpleasant; and they undoubtedly appeal to a very large number of individuals. The last is, undoubtedly, painful; but it is, probably, necessary in some degree to prevent sheer laziness. The third is the least satisfactory;

[4] Op. cit., p. 305.

[1] Even shopkeepers, a diminishing but still numerous body, otherwise difficult to classify, appear, by the operation of the Shop Hours Acts, to be settling into this class. The hours of domestic servants are not, in theory, fixed; but in practice they tend to be.

and it is, perhaps, the strongest indictment of the present industrial system. It has, however, the advantage of enabling a member of the class in question to widen the scope of his mind, by pursuing, in his leisure, side-lines of activity, from golf to philately, from classical music to ping-pong. This class is, naturally and properly, on the look-out to improve its position. But the last thing its members wish, as a rule, is to face the bleak world of individual enterprise.

2. *The Working-Class.*—These are relatively few in number, but include most of the enterprising members of the community. Their essential characteristic is, that they face the stern sea of competition, often unaided, though, doubtless, in a good many cases, fortified by some kind of endowment. They are the 'independent contractors' of commerce, industry, and finance; the 'professional workers' generally (except the parsons); artists of all kinds, except those engaged as teachers, illustrators, editors, or orchestral performers at a fixed wage; professional politicians, inventors, scientific research-workers, scholars. The mortality in this class is pretty high; and many members have to maintain life on an income which would be despised by an average member of the leisured class. They have no fixed hours, and no fixed wage (at any rate until they reach the top of their professions). Some of them make very large pecuniary fortunes; but it is probably true with most of them, that their best reward, even if pecuniary success arrives, is the sense of achievement, and the feeling of superiority derived from having won the game of life off their own bats.

3. *The Idle Class*, or drones.—These comprise people of all social ranks—owners of inherited wealth, fraudulent speculators, touts of various kinds, beggars and loafers of all degrees, and the 'criminal classes' technically so called, whether they live in mansions or Rowton Houses, who, through design or sheer incapacity, sponge on the community, and give no return for their keep. They have realized the truth of the adage: that there are only three ways of acquiring a livelihood—working, begging, and stealing. And they have chosen one of the last two. The aim of legislation should be to extinguish this class; painlessly, if possible, but in any case effectually.

This classification may not be 'orthodox'; but it is, probably, pretty near the truth.

ARBITRATION IN GERMANY.

GERMANY, like the rest of the civilized nations, is at present convulsed in the throes of what may, not inappropriately perhaps, be termed the universal epidemic of arbitration. Widespread dissatisfaction with the slow working of its Courts of law—overburdened with a mass of post-war problems, among which that caused by the depreciation and subsequent stabilization of the currency is, perhaps, the gravest and most exacting—has induced the general public to look round for some remedy; and this remedy is, in the view of very many competent persons, considered to be arbitration. Whether arbitration is the remedy or whether it is not, in its present form at any rate, as pernicious as the evil to be remedied, is debatable, as was very aptly pointed out in a paper read at the last provincial meeting of the Law Society at Birmingham. Whilst, however, England may justly boast the possession of an Arbitration Act the provisions of which are, although far from being perfect, at any rate decidedly workable, Germany finds itself in the struggle to establish arbitration as an alternative to civil procedure equipped with a system which, in the view of all authorities, is undoubtedly very inadequate.

That this should be so is hardly to be wondered at. When the era of codification in the newly-founded German Empire began, almost the first subject to be codified was civil procedure. The materials for the projected code were found in the French Code de Procedure Civile, the codes of various federal German States, and in the writings of the pandectists, Puchta, Vangerow, Windscheid and others. The authors dealt, as is well known, with the Roman law as revived in Germany during the Middle Ages adapted to meet local needs, and their method has been pertinently described by no less an authority than Jhering as 'juristic chemistry.' They did in fact also deal with the rules of arbitration, not because they attributed to them any practical value, but because it formed part of the Roman, and incidentally the Canonic, systems of law. How little they thought of it is best evidenced by the fact that Puchta allows himself, for once, the relaxation of a little joke: "Don't make a compromise,

you'll lose your case otherwise!" (compromise being, of course, the Roman *compromissum* [1] or submission to arbitration).

The provisions relating to arbitration are to be found in the 10th Book of the German Code of Civil Procedure, 1879, as amended two years ago. Based to some extent on the French Code de Procedure Civile,[2] very largely affected by the doctrines of the pandectists, it was originally and still is a very unsatisfactory arrangement. The Courts guarded their rights with extreme jealousy, and were only too inclined to set aside awards where even a slight failure to comply with the provisions of the Code would justify such action. The various rules of procedure in arbitration were, on the other hand, so vague or else so stringent that hardly anyone but a very experienced practical lawyer could attempt to undertake an arbitration with anything approaching success. These two facts led to the institution, on a very large scale, of self-styled permanent "Courts of Arbitration," usually intimately connected with some large trade association or chamber of commerce or stock exchange.[3] These 'Courts' were really panels of arbitrators, but they were occasionally presided over by trained lawyers and they always had the assistance of 'Clerks' who were lawyers and capable of providing very elaborate rules of procedure supplementing and even displacing the rules of the Code. As an instance of the latter may be mentioned the almost universal disregard of the provision in the Code that every award must be lodged with the Court of law, as a condition precedent to proceedings for its enforcement being taken. Indeed, the trade associations, etc., even provided their own sanctions for disobedience to the awards

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[1] I respectfully question Mr. Nordon's statement, in his admirable paper on arbitration referred to in the text, that the Roman *iudex* was the prototype of our modern arbitrator. It is submitted that the two are quite distinct from each other, and that the *actio in iudicem qui litem suam facit* does not lie against an arbiter. This appears from Dig. 4. 8, *qui arbitrium receperint ut sententiam dicant*, where will also be found a great many rules now embodied in our Arbitration Act. The quotation in the text is from 'Das Institut der Schiedsrichter nach seinem heutigen Gebrauch,' p. 51, by Puchta.

[2] Since January 1, 1926, France has adapted the Code to the modern requirements in regard to arbitration. It is a mistake, however, to think that before that date French law disregarded arbitration, and only recognized the *aimable compositeur*. On the contrary, arbitration was well known, but only in so far as there was a submission in respect of an already existing dispute. Further, it was quite usual to provide in an agreement that it should be governed by, say, English law, and thus to make arbitration possible. All this is now unnecessary.

[3] As, *e.g.* the Berlin and Hamburg Stock Exchanges, Chambers of Commerce, the Courts of Arbitration of the Association of Dealers in Coffee, Colonial Products, and many others in Hamburg.

of their courts, the strongest and, with respect, the most illegal of which being the blacklisting of the disobedient party. This was, of course, a glaring instance of injustice in that the disobedient party was subjected to arbitrary force regardless of the provisions of the law of the land and the remedies provided by it. That such a state of affairs could not be termed otherwise than as highly objectionable is obvious, and the Courts of law have consequently always viewed awards with suspicion. They have, in particular, regularly set aside awards made by practising lawyers, and even, frequently, such made by lawyers in the employ of a trade association. As recently as 1926 the Supreme Court at Leipsic dismissed an action by a Judge who sued for his costs incurred as arbitrator in an arbitration. The Supreme Court thought that it was incompatible with the duties of a Judge to act as arbitrator in the employ of private parties! Surely a view which is not easily comprehensible to an English lawyer, but which is readily intelligible in the light of certain abuses occasionally found in the arbitration in Germany. (See, for the decision, Juristische Wochenschrift, 1926, p. 1569.)

The rules of the German Code in regard to arbitration are more particularly as follows:—

1. The submission to arbitration may be in any form the parties think fit; it is quite permissible to have an oral submission. The reference may be in respect of all or any difference provided the parties may compromise it by the rules of the civil code (section 1025), and irrespective of whether it is present or future. With regard to future disputes it is important to note that the submission will not be valid unless it is expressly provided therein that the disputes must be such as shall or may arise in a clearly defined agreement (section 1026). On the other hand submission may arise by implication from the ordinary course of business dealings between persons, and may even be provided for by testament (section 1048). It is obvious that these two cases may give rise to great difficulties of construction and their desirability is questionable.

2. Unless the parties otherwise provide, the reference shall be to two arbitrators, either party appointing its arbitrator (section 1028). No form for the appointment is prescribed. Should one of the parties fail to appoint its arbitrator within seven days after receiving written notice by the other party of the appointment of its arbitrator, the latter party may apply to the Court for the appointment of the second arbitrator (section 1029). Once such application has been made, the defaulting

party loses the right to mend its mistake and must accept the arbitrator selected by the Court.[4]

Generally speaking, anybody may be appointed as arbitrator, but the appointment once made is by no means final. It is open to either party to challenge the arbitrator of the other for a multitude of reasons, some of which being infancy, partiality, relationship between arbitrator and party (section 1032).[5] If a party enters on the reference with a knowledge of any defect in an arbitrator he is bound by the award, but an award made with the assistance of an arbitrator who might have been challenged had the parties known of any grounds for so doing can be set saide. As has been already stated, the Courts do not view the appointment of Judges or advocates at all favourably, and have repeatedly refused to recognize awards made by such persons.

If an arbitrator named in the submission dies, or refuses, or, for any reason whatsoever, is unable to act, or unduly delays to commence his duties, the submission becomes void, unless the parties have expressly provided for the contingency (section 1033). Another very extraordinary provision is that if the arbitrators notify the parties that they have reached a deadlock (and, presumably, that they cannot agree) the submission shall become void. There is no provision for the appointment of an umpire in cases of this kind, but it is of course open to the parties to deal with the emergency in the submission (*ibid.*).

There are few rules dealing with the procedure in an arbitration, but there is, on the other hand, a provision which may fairly be described as a dangerous pitfall. No award shall be enforceable if the arbitrators have disregarded some provision of the law which is 'ius strictum' in the sense that the parties cannot provide anything to the contrary (section 1042, subsection 2). So vague a clause must needs give rise to many doubts, particularly since it seems to compel the arbitrators not only to know the whole substantive law but also to apply it where necessary, and to apply it correctly.

Apart from these rules, it is open to the parties to determine the form of procedure, and in the absence of any agreement the arbitrators may do as they think fit,[6] provided they keep within

[4] This has been held by the Supreme Court of Leipsic. See 'Entscheidungen des Reichsgerichts in Zivilsachen,' vol. 45, p. 382.

[5] Women may be arbitrators, their disabilities having been abolished by Article 109, sub-section 2 of the Constitution of the German Republic.

[6] They are not, however, bound to follow the ordinary rules of procedure or evidence, and are sometimes even precluded from applying them. I am indebted to Mr. F. W. Braune, of London, for pointing out to me the decision of the

the law. They cannot, however, examine witnesses on oath nor can they, in the absence of express provision to the contrary, even apply to the Court to have witnesses examined. The parties must do this (sections 1050, 1051). The arbitrators should always give either party an opportunity of being heard, and where they have done so, but the party fails to appear or to plead, they must proceed ex parte (section 1034).

2. The award must be in writing, signed by the arbitrators and must be delivered by them to the Court which would have been competent to deal with the matter if no arbitration had taken place (section 1053). A translation copied of the award, also signed by the arbitrators, must be served on the parties. If the award does not comply with these provisions it is wholly bad. It is then, in law the effect of a judgment between the parties (section 1040). Before it can be enforced, however, an order of the Court must be obtained, but such order may not be made for various reasons, most of which have already been dealt with (sections 1041, 1042). A foreign award is treated like a German award, and it therefore appears to be essential to deposit the award with the Court. In a whole, the Courts in Germany seem to be inclined to view awards abroad with suspicion and it happens frequently enough that notwithstanding the existence of the foreign award the party relying on it is compelled for some purely technical reason or other to start proceedings de novo.[1]

3. An award may be set aside either before or after the order for its enforcement has been obtained. The grounds on which it may be set aside are numerous and coincide on a whole with those already mentioned above. That parties should be entitled to have awards set aside before they have been made enforceable, is proper and often necessary. But it is hardly conceivable why a party should be in a position to apply for setting aside of the award after the Court has made an order. This position is all the more inexplicable since an action to have the award set aside may be brought within ten years of its making, provided that the party seeking to have the award set aside shall have instituted proceedings in that behalf within one month of obtaining knowledge of any defect in the procedure or the award (section 1044).

Supreme Court of Leipzig (vol. 51, p. 374) expressly dealing with an instance of the latter kind.

[1] The law whether a foreign award can be treated like a German award, or whether it can only serve as the basis of an action de novo, is in the words of the Supreme Court (vol. 51, p. 374) whether it complies with the requirements of German law or not. Hence that these requirements are not very nearly behind the requirements of the rule because even more apparent.

The following case may serve as an illustration of this peculiar position: Suppose A was appointed by one of the parties, the award is made and nothing seems to be wrong. The award is enforced after an order has been obtained and then, five years afterwards, the other party discovers that the arbitrator was related to the party that appointed him. An action for setting aside the award may be brought within one month.[8] What becomes of the maxim 'Quieta non movere'?

4. It happens sometimes that instead of making an award the arbitrators suggest to the parties a compromise whereby the dispute is settled. A compromise of this kind may be enforced in the same way as an award, but here again we find a proviso which is vague and questionable: If the compromise is void as against the law, it cannot be enforced (section 1044*a*).

5. A comparison between arbitration in Germany and that in England must undoubtedly be in favour of the English system. The German system, if a system it may be called, is so very vague that from a practical point of view it may be regarded as not being very helpful. On the one hand, the arbitrators are given great freedom, greater, in fact, than in England. But this freedom is really illusory, since there is always a possibility of disregarding the award because of some mistake of law, substantive or adjective. The arbitrators are not told what the law is, but they are expected to apply it correctly. There is no provision corresponding to the 'case stated' in Germany, and the arbitrators are mostly in the dark as to what they ought to do. But if, uncertain as to what they ought to do, they delay their decision unduly, the submission will become void. Where parties have sought to overcome these difficulties by appointing practical lawyers as arbitrators, the Courts have refused to enforce the awards because they will not have practical lawyers as arbitrators. Again, we in England apply to the Court, *i.e.*, the Master, to have the award enforced. In Germany you must as a rule go to a Court before which only advocates are allowed to plead, and which may consist of three or five members. This invariably means that the proceedings are retarded, and thus the main object of arbitration, a quick trial, becomes nugatory. Small wonder, therefore, that German jurists are devoting a good deal of attention to the provisions of the Arbitration Act, 1889, with a view to adopting it as far as practicable. But as long as the present concoction of juristic chemistry remains in

[8] That this is so follows from the joint effect of sections 1032 and 1041, Note 1. A case of a similar nature was decided by the Supreme Court (vol. 93, p. 288).

force, and it seems very improbable that it will in the near future be replaced by something more useful, arbitration in Germany will always remain an institution of little value. The obvious inference from these premises is, of course, that arbitration between German and English firms should be avoided as much as possible in order that disappointment be prevented, or should only be undertaken if detailed rules of procedure, of evidence, and of the law to be applied by the arbitrators are laid down.

E. C. Weiss.

SOME ASPECTS OF FRENCH LEGAL HISTORY.

I.

THE work of writing a one-volume history of French law, from the beginnings down to the end of the *ancien régime*, is a difficult and burdensome task which few French jurists have undertaken. It was essayed by Viollet and also by Esmein; and in each instance it was brought to successful accomplishment in a manner that meant an enrichment of the literature of legal history. M. Declareuil has followed in the footsteps of these masters; and he has written a book which, in respect of its sound learning and its judicious handling of the masses of material at disposal, is eminently fit to take a place of equality beside the best of the writings which give us a short survey of the main stages in the development of French law.[1] Like Viollet and Esmein, however, he has made no attempt to describe and explain all the aspects of French legal history. His work, like Esmein's, is primarily a history of constitutional institutions and public law; and it contains, also, some account of the literature and sources of the law.

The book is, in fact, a *histoire générale du droit français*; and to the writing of such a work M. Declareuil brought the resources of an exceptional equipment as a scholar. Nor has he been previously unknown in the field of historical literature: indeed, he has long held rank as one of the leading legal historians of present-day France. Not only has he written many articles for the 'Nouvelle revue historique de droit français et étranger' and other periodicals, but he has published several learned works. Included among his longer writings are: 'Rome et l'organisation du droit,' 'Quelques problèmes d'histoire des institutions municipales au temps de l'empire romain,' 'Les preuves judiciaires dans le droit franc du V^e^ au VIII^e^ siècle,' 'La justice dans les coutumes primitives,' and 'Les idées

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[1] Histoire Générale du Droit Français des Origines à 1789. A l'usage des Étudiants des Facultés de Droit. Par J. Declareuil, Professeur à la Faculté de Droit de l'Université de Toulouse. Paris: Recueil Sirey. 1925. Pp. viii, 1076.

politiques de Guez de Balzac.'[2] These previous studies had given M. Declareuil an excellent preparation for the writing of his present systematic work. But how widely he has read in the original sources and the medieval and modern literature of his subject can be fully realized only by a perusal of his thousands of learned footnotes. While intended primarily for beginners in the study of the history of French public law, the book which M. Declareuil presents to us is designed, in fact, to interest and instruct mature scholars. They will benefit from a reading of the text itself; and they will also delight in the richness of the apparatus provided by these footnotes.

Although the book tells us but little of the development of the private law, this fact should not disconcert us; for, from the point of view of the beginner in historical studies of law, for whom M. Declareuil has written, there is a distinct advantage in reserving the examination of private law until after the main stages in institutional progress have been mastered. The history of institutions and public law and the history of private law are intimately interwoven, being in reality but different aspects of one and the same development; but the stress of the historian may be laid upon one of these aspects so long as he does not fail to show the significance of the other. Writing for beginners, M. Declareuil has done right to lay emphasis upon institutional development; for thereby he has given the student a framework into which the details of the history of private law may be fitted at a later time. But although the learned author has omitted much of the private law, he has, nevertheless, dealt with certain subjects which will appeal especially to the student of that part of legal history. He writes, for example, of *la condition des personnes et des terres* in all the epochs which he reviews[3]; he discourses also upon the Courts and the administration of justice[4]; and, similarly, he sketches the history of legislation and of the sources and literature of the law in the different periods.[5] These features of the work prepare the mind of the student for his later, and more intensive, reading of the history of private law: and not the least advantage which he will derive from these parts of the book is that he will

[2] An historical survey of Roman Law by M. Declareuil, in English, entitled Rome the Law-Giver,' was published early in 1927 as a volume in the Roman section of the series known as the 'History of Civilization.' This work had already appeared in the French series, known as 'L'Evolution de l'Humanité,' published under the direction of M. Henri Berr.

[3] See pp. 41-43, 59-63, 152-170, 355-388, 1025-1061.

[4] See pp. 49, 103-108, 125-127, 143-147, 222-235, 275-279, 331-343, 586-700, 997-1010.

[5] See pp. 71-83, 101-103, 122-125, 147-149, 343-350, 795-887, 1010-1011.

acquire, at the outset of his studies, some knowledge of the vaster movements of history that have affected the course of legal growth. From an examination of legal sources he will be enabled to grasp, for example, the significance of the growth and spread of the Canon Law. He will see that this cosmopolitan legal system of the Church was one of the main bases of ordered society in medieval Europe and that it gave colour to the native laws and customs of France and of other countries through the processes of adoption and incorporation. Indeed, it is hardly too much to say that the mastery of the subject-matter of M. Declareuil's present volume in its entirety is an indispensable foundation for the study of the origin and growth of the several branches of the private law, such as property, contract, tort, inheritance, and the like. To begin the historical study of these subjects without a proper foundation, a foundation formed by a knowledge of the history of constitutional institutions, legal sources, epochs of time and factors in progress, would be confusing to the mind and leave it in fact in a state of uncertainty and semi-darkness. It would be like beginning the study of the history of equity without a previous grounding in the history of the early common law. Lest it grope its way to disaster the mind of the student must be directed to follow, from their beginning to their end, the main highways of legal history—highways, moreover, that are clearly marked by sign-posts and points of illumination.

M. Declareuil has abstained, and very properly abstained, from presenting the student with a dry legal account of his subject. For most young people—and, indeed, for most people of maturer years—modern law is invested with qualities which make its study, in the initial stages, repellant to the mind. The formalities and technicalities of the law, even the ideas and rules and principles which are at play beneath the outward cover of law-making and law-enforcing processes, possess no alluring magic to most beginners. What is true of the study of modern laws is true also of their history. The student needs to have his mind brought into immediate touch with the environment of the law in all the stages of its origins and growth; he demands, if his interest is to be awakened and held, to see the colours and the outlines of the ever-changing legal landscape. He must behold, rapt in alert attention, the moving-pictures of historic human life, and within them, as the central figures, the law and all the other silent actors in the drama of civilization. M. Declareuil has recognized this demand, this insistent demand, of the youthful mind. Nor, in this respect, are many

older minds less youthful and less insistent in their call for the variegated scenes of life that surround the origins and development of legal systems. Man himself, if we believe in the truth of what the sage Anatole France has written, is 'still in the fire of youth. We must not ask him to be too reasonable. He has need of being amused by stories. Do not take away from him history, which is the finest intellectual amusement.' M. Declareuil has not taken away from his readers, young or old, that 'finest intellectual interest' which passes current among us under the name of History. He appeals to the spirit and not merely to the intellect; and it is because of this appeal to the spirit that one finds his pages instinct with the progress of French life and civilization. 'C'est pourquoi, dans cet ouvrage,' as he has written in his preface, 'sans rien atténuer des caractères juridiques des institutions décrites ou des faits narrés, ni rien voiler de ce qui les constitue le domaine du droit, puisque avant tout c'est le propre objet du livre, l'auteur s'est efforcé d'en laisser voir le jeu en fonction du milieu social et de leur conserver l'allure, permanente ou changeante, qu'ils eurent d'être des éléments de la vie nationale.'

Let it not be thought, however, that the reading of his book is easy merely because M. Declareuil has envisaged the origins and development of French law in the environment of social and national life. The author's broad point of view, the systematic arrangement of the results of his researches, and the lucid presentation of his thought, make the reading of his book easier than the reading of many other volumes on French legal history that have appeared; and yet the vast periods of time covered by the author and the magnitude of the events and processes and movements which he portrays create a barrier which the mind surmounts only by studious grasp of details and attentive reflection on the causes and effects which they prove. The reader will be amply repaid, however, for the effort which he himself must exert. When he reads he will bear in mind, as M. de Lapradelle has reminded us in his contribution to 'Modern France: A Companion to French Studies,'[6] that for many centuries before the Revolution the French aim was unity in institutions and law; and this large fact in French history will help him to read between the lines in M. Declareuil's volume, and to harmonize and consolidate the several lines of growth that are there explained in detail. The reader has need to remember also that in the study of the legal history of

[6] Ed. Tilley, 1922, p. 322.

France, or of any other country, he must open his mind to two streams of thought—the thought presented by the lawyer and the thought furnished by the historian. The legal historian whose works he reads combines in himself the qualities of the lawyer and of the historian. The words employed by Sir Philip Sidney in his 'Defence of Poesie' are, in this connection, not unworthy of our reflection. 'The Lawyer saith,' declares Sidney, 'what men have determined. The Historian, what men have done.' Combining in his own person the qualities of lawyer and historian, and approaching his work with the dual aim of writing of both law and history, the legal historian must ever consider not only what men have determined, but also what they have done. M. Declareuil has written his present work in that spirit. The reader who approaches the book in the proper mental attitude, an attitude suffused with the thought that law is an integral part of history, and that it cannot be disentangled from the past, will not fail to discover that one of the chief merits of M. Declareuil as an historian of law is his practical application of Sir Philip Sidney's *dictum*.

II.

Students of every aspect of French legal history will read with profit the section on origins,[7] for therein the author gives a scholarly account of the physical, racial, and cultural factors which lie at the basis of all later developments. In those pages M. Declareuil takes us back into the times of the Celts, Romans, and Franks; and he also gives us a hint as to later foreign factors that have influenced the growth of French law and institutions. Reeves, in his 'History of the English Law,' observed that 'the common law, like our language, is of a various and motley origin, as various as the nations that have peopled this country in different parts and at different periods.' The French law is equally of 'a various and motley origin'; and, indeed, every system of civilized law is derived from a complex of different origins or sources. One of the main lessons of legal history is that no community which has lived in relationship with other communities possesses a body of law that is purely native or indigenous. The importation of legal exotics by a community seems, indeed, to be essential to the progressive development of its law. The growth of the *ius gentium* meant progress in the development of the Roman legal system; and the adoption of canonical elements enriched the secular legal

[7] Pp. 1-87.

systems of the Middle Ages, bringing them into greater harmony with social conditions and fortifying them for their future struggle for existence. Nor is the lesson of the widespread influence of the medieval civilian glossators without its significance to the one who studies the nature of the elements composing the legal systems of Europe. Naturally, the main stress in M. Declareuil's pages is laid upon the Roman and Germanic foundations of the French legal polity; and the teachings of this preliminary survey are of much value to the reader of pages devoted to constitutional, social, ecclesiastical, and legal institutions in the Merovingian and Carolingian epochs.[8] It is a part of the result of all recent researches, such as those embodied by the late Sir Samuel Dill in his 'Roman Society in Gaul in the Merovingian Age' (1926), that the nature and working of the institutions of these epochs were influenced by a complex mingling of both Roman and Germanic factors. As Sir Samuel Dill reminds us, 'the so-called barbarian conquest of the West was, to a great extent, a process of infiltration, or "peaceful penetration."' Since, in a marked degree, social life in Gaul continued with no violent interruption, institutional and legal features of the Roman age were given an opportunity of affecting the character of the Frankish *régime*. There would be some danger to historical accuracy if the Roman contribution to French institutions in the Merovingian and Carolingian epochs were overstated; and yet that contribution deserves careful attention in any study of such matters as royal power, the origins of feudalism, the relations of State and Church, the system of the personality of laws, and the establishment, in the southern regions, of the Roman law as the *droit écrit*. M. Declareuil deals with some of these matters; and the views which he holds are not only based on a study of reliable authorities, but dictated by his own sound judgment as one of the ablest and most thoughtful of contemporary writers on French legal history.

Nor has the task of reconstructing on paper the legal institutions of that remote epoch of the Merovingians and Carolingians been easy. The difficulty lies not so much in the paucity or the abundance of materials at the disposal of the historian. The true difficulty consists in the fact that in those far-off days the law itself was not simple; and that, in consequence, it is not easy for a man of the twentieth century to place himself in that complex legal atmosphere. As Maitland expressed it, in a well-known passage of 'Domesday Book and

[8] Pp. 89-170.

Beyond,' 'the doctrine that our remote forefathers being simple folk had simple law dies hard.' M. Declareuil teaches no such doctrine; nor does any other scholarly legal historian of the present day who has penetrated to the depths of society in early medieval times. If we could but look into the minds of legal historians, we should, no doubt, discover that many of the ablest of them have been tempted to repeat the adventure of Sir Walter Raleigh, who, realizing that he could be mistaken in his reconstruction of events that took place beneath his prison windows under his own eyes, and reflecting on the greater difficulty of knowing the truth about distant events, threw the manuscript of the second part of his 'History of the World' into the fire.

M. Declareuil considers the seigneurial *régime* at some length [9] before he passes on to his main theme, the history of the French realm before 1789.[1] Both of these great epochs of French development are depicted with masterly skill; the details have been brought into their true perspective and the main lines of evolution, framed in an orderly system of arrangement, have been given their distinctive characteristics. In no other work will the reader find an account of feudal and royal institutions that is more compact and more suited to the needs of the one who comes for the first time to the study of the subject.

M. Declareuil's book will not displace the works of Esmein, Viollet, and Brissaud; for in the future, as in the past, the student of the history of French institutions will need to consult these masterpieces of legal literature. M. Declareuil's book serves in truth a more useful purpose than that of displacement; for it presents us with a valuable supplement to our existing guides, a supplement which brings old facts into new lights and which also describes features of growth that have been revealed only by very recent research. Let it suffice to remark once more, by way of emphasis, that M. Declareuil is a jurist as well as an historian, and that he has written a book which represents both aspects of his equipment. The reader must not expect, however, to find everything in a short work. The very vastness of certain periods, more particularly the vastness of the period of Capetian royalty, must necessarily result in omissions which leave the parts recorded by the author incomplete and bereft of some of their relations to aspects of growth which he has not brought within the compass of his chapters. But, although the reader will be obliged to peruse the book with this caution in

[9] Pp. 190-388.
[1] Pp. 389-1061.

mind, he will derive from it not only great profit, but also the pleasure which always comes from the examination of a true scholar's literary treatment of an important aspect of Western history.

III.

Out of the wealth of subject-matter covered by M. Declareuil's volume only two or three principal features of development can be selected for present notice. One of these aspects of legal history is the gradual establishment, and the equally gradual decay, of feudal institutions. Vinogradoff's chapters in the 'Cambridge Medieval History' have taught us to look for the roots of institutional medievalism in the last centuries of Roman rule in the West; for, as he has remarked, in many points, including that of feudalism, 'the peculiarities of medieval law are foreshadowed in the declining Empire.' This is M. Declareuil's standpoint. From the time of Diocletian onwards the weakness of the Roman State led subjects, insufficiently protected, to seek the guarantees of social and legal order in two principal directions—in an extensive development of a *régime corporatif* and in the establishment of a *régime quasi-seigneurial* based upon *commendatio* and *patrocinium*.[2] The problem as to the origins of the feudal system has given rise to a vast literature and to divergent views.[3] Here it need only be remarked that in seeking for the origins of the feudal *régime* M. Declareuil goes further back in history than do Brunner and certain other leaders of the Germanist school. For the growth of this *régime* in Gaul during the Merovingian and Carolingian epochs M. Declareuil is, however, less informing than are Brunner and some of the other legal historians of our time. In dealing with those epochs M. Declareuil's chief attention is fixed on the subjects of royal power and the Church[4]; and, while he allows us a glimpse of the progress of feudalism in Frankish times,[5] he reserves his main account of *le régime seigneurial et la société féodale* for later chapters.[6] In a little over two hundred pages he gives us an enlightening survey of the characteristics and working of feudal institutions. Historians of what is, after all, one of the most distinctive features of life in the medieval age will be well advised, therefore, to consult this survey, which is fully abreast of the latest research.

[2] Pp. 43-46.
[3] See Brunner, Deutsche Rechtsgeschichte, vol. ii, 1892, pp. 242-303.
[4] Pp. 90-151.
[5] Pp. 152-170.
[6] Pp. 171-388.

Among other things they will find certain theories of M. Flach, expressed in his 'Origines de l'ancienne France,' energetically contested; and they will also discover that municipal, corporative, and ecclesiastical institutions of the feudal age are brought into the historical picture. In tracing the growth of royal power in later medieval and in modern times[7] M. Declareuil never loses sight of the complex problems incident to the fortunes of the institutions that took firm root in the feudal age; he shows us that these institutions persisted and that, at the same time, they suffered decay, or were transformed, in the contest with royalism. While making kingship his principal theme, and thus dealing at some length with the subject of the nature and administration of central, provincial and local institutions, he yet weaves into his account of these vital features of the constitution an adequate treatment of religious institutions and of land-holding and the legal position of persons.

Here and there the reader obtains the benefit of M. Declareuil's observations as an acute political thinker; as when he remarks, in conformity with lessons derived from a study of both 'written' and 'unwritten' constitutions, that 'toute constitution est plus ou moins coutumière.'[8] In reality, custom or usage exercises a more potent influence on the working of social, political, and legal institutions than the student of written constitutions and written laws is sometimes willing to admit. Even in the French regions of the *droit écrit* custom played a rôle which, in the light of recent researches in the history of French law, we are only gradually coming to understand[9]; and even a sacrosanct document like the Constitution of the United States of America can serve its purposes only by the growth of usages which overlay its words and modify its application to the affairs of life. Equally illuminating are M. Declareuil's comments on the growth of absolutism and the independence of the French crown in respect of foreign Powers, such as the Germanic Roman Empire and the Papacy.[1] Students of Glanvill's words and of Bracton's well-known, but somewhat perplexing, sentences on the position and power of the King[2] will be instructed by reading M. Declareuil's comments on certain passages which are to be found in 'Jostice et Plet' and Beaumanoir—'Ce que plest

[7] Pp. 389-1061.
[8] P. 390.
[9] See, *e.g.*, Caillemer's essay on 'Les Idées coutumières et la Renaissance du Droit romain dans le Sud-Est de la France,' published in Essays in Legal History (ed. Vinogradoff), 1913, pp. 174-200.
[1] Pp. 427-449.
[2] *E.g.* Bracton, f. 5 b; see Woodbine's edition of Bracton, vol. i, pp. 117-119, vol. ii, pp. 32, 33.

au prince vaut loy' and 'Ce qui li plest à fere doit estre tenu por loi.' It seems somewhat strange, however, that the learned author has not referred to Esmein's valuable essay on 'La Maxime *Princeps legibus solutus est* dans l'ancien droit public français,'[3] a contribution by M. Declareuil's great predecessor which places the whole problem of Bracton's and Beaumanoir's teaching in a new light.[4]

English constitutional historians will find much in M. Declareuil's book to instruct them by way of comparing French institutional growths with those of the island kingdom. Since one illustration of the value of such comparative studies must suffice for our present purposes, let it be recalled to memory that M. Langlois has recently remarked that the French *curia regis* 'became improved little by little, by a process of internal differentiation, whose phases can be studied in detail after the thirteenth century.'[5] A similar process of internal differentiation is observable in the history of the English *curia regis*, a process, however, which, long before the close of the thirteenth century, had already proceeded far. M. Declareuil's pages on the French process are of exceptional interest[6]; but it is regrettable that they contain only one or two casual references to the corresponding development in England. There is opportunity here for the writing of an essay in the comparative history of institutions. The author of such an essay would find valuable suggestions on the course of French development, and also an introduction to the literature which bears upon it, in the chapter which M. Declareuil has devoted to *les institutions centrales de la monarchie.*

The English legal historian will read with added profit M. Declareuil's chapter on 'legislative power and the sources of law' in the epoch of Capetian royalty,[7] if he bears the corresponding English development in mind. In France two bodies of law, each one of which had been influenced by Roman and Canonical ideas and principles, acquired positions of vital importance in the legal system of the country long before the fall of the *ancien régime.* The *droit coutumier*, based on

[3] See pp. 432-434; and Essays in Legal History (ed. Vinogradoff), 1913, pp. 201-214.

[4] Any study of this problem must take into account the influence of Roman legal doctrines on Bracton (see the writings of Maitland and other English legal historians and Beaumanoir (see P. Van Wetter's article on 'Le droit romain et Beaumanoir' in Mélanges Fitting, 1908, vol. ii, pp. 533-582).

[5] Medieval France: A Companion to French Studies (ed. Tilley), 1922, p. 71.

[6] Pp. 450-534.

[7] Pp. 795-887.

ancient foundations,[8] was brought into an official redaction in the sixteenth century; and in this form it not only became the object of juristic study, but was used at a later time as one of the chief sources of the subject-matter of Napoleon's Codes. While the development of the *droit coutumier* was in progress, the *droit royal* also rose into great prominence; and, moreover, since the King was viewed as the sole legislator in his realm, particularly in the epoch of absolutism, royal policy had a potent effect upon nearly every phase of legal growth. The legislative power of the King was partly controlled, however, by other factors in the life of the State. The *Cours judiciaires*, for example, played a rôle that was far from insignificant. They possessed ancient prerogatives which they were not slow to assert, prerogatives in regard to the publication of *lois*, such as those of verification, remonstrance, and refusal to register; and by the exercise of these prerogative rights they were able to determine in some measure the form and substance of royal legislation. Codification of the growing mass of royal *ordonnances*, in the interests of justice and unity, at length became essential; but efforts to effect this end were only truly successful in the age of Louis XIV.[9] As M. Declareuil remarks[1]: 'Au temps seulement de Louis XIV, le moment parut favorable pour codifier et unifier de grandes parties du droit français. L'unité nationale était à peu près réalisée dans les moeurs et les idées; les particularismes régionaux ne s'opposaient plus très fortement à l'entreprise et chacun voyait l'anarchie juridique qui se répandait des jurisprudences opposées et des attitudes divergentes, vis-à-vis des ordonnances ou édits, des Cours souveraines.' The opportunity was seized. 'Pour la première fois, sous Louis XIV, avait été réalisée, à l'aide d'une technique précise et d'un plan méthodique, en une langue limpide et soignée, la codification d'une part importante

[8] On the many *coutumiers* of the Middle Ages, see Declareuil, op. cit. pp. 857-872. Owing to the close relationship between French and English law and custom during the Norman and Angevin periods of English history, some of these French *coutumiers* are worthy of careful examination by English legal historians. The recent writings of a few scholars, notably those of Haskins and Powicke, point the way to more comprehensive and detailed studies of the reciprocal influences of French and English customs and institutions in the age of the Norman and Angevin Empire. Thus, for example, the early Custumals of Anjou, which have been studied by Halphen, Beautemps-Beaupré, Viollet, and other French historians, should now be examined from the special point of view of their relationship to early English custom.

[9] Some of the earlier efforts had met with opposition. See Caillemer's article on 'Des Resistances que les Parlements opposèrent, à la fin du XVIe siècle, à quelques Essais d'unification du Droit Civil,' in Le Code Civil: Livre du Centenaire, 1904, vol. ii, pp. 1075-1108.

[1] See pp. 820, 822.

du droit français.' Under Louis XV and Louis XVI the great project of codification, which embraced large parts of the private law, was brought somewhat nearer to completion; and in the time of the latter King the reform of the criminal law, although it met with opposition on the part of the *Cours souveraines*, was advanced a stage. The royal *ordonnances* of the time of Louis XIV and his successors, in which much of the *droit royal*, both civil and criminal, had been given a codified form, were largely the work of the jurists; and on the basis of these texts of the *droit royal* jurists also wrote many treatises, in which they dealt with the innumerable problems of history, explanation, and criticism that arose. The growth of the *droit coutumier* and the *droit royal*, side by side, gave rise, moreover, to problems as to their relation *inter se*; and one of the most important of these problems concerned the scope of the King's legislative power. Although the movement for the codification and unification of the law, which had been greatly accelerated by the policy of Louis XIV and his successors, was interrupted by the Revolution, when at length, particularly in the time of Napoleon, this process resumed its course, large parts of the law of the *ancien régime*, the *droit royal* as well as the *droit coutumier*, found their place in the great Codes.

IV.

For reasons based on the scheme of legal education in the Universities of France M. Declareuil has closed his sketch with the end of the *ancien régime*. Although, therefore, the momentous epochs of legal history which began in 1789, the year of the meeting of the States-General, Louis XVI's *lit de justice*, and the taking of the Bastile, do not find a place in M. Declareuil's pages, he would be the first to hold that no one can fully understand the earlier history without the contrast furnished by the developments of the time of the Revolution, the Consulate, and the Empire, and from 1814 to our own day.[2]

The Revolution introduced violent and drastic changes, both in the constitutional framework of the State and in the system of public and private law; and yet the deeper historical significance of the Revolution would be only partially grasped

[2] On the history of French law since 1789, see M. de Lapradelle's chapter on 'Law' in Modern France: A Companion to French Studies (ed. Tilley), 1922, pp. 338-358 (valuable bibliography, pp. 357, 358). For the history of French criminal law and procedure since 1789, works by von Bar (law) and Esmein (procedure), published in English translations in the 'Continental Legal History Series' (ed. Wigmore and others, Boston), may be consulted.

if it were not viewed as an epoch in which the earlier evolution of the law continued, progress towards its ultimate goal being furthered by the stirring events of the time. It is true that transformation of the law accompanied the process of unification culminating in the great Codes of Napoleon; but this transformation was only partial, the foundation of the codification being the *droit coutumier* and the *droit royal* of the *ancien régime*. Laws are so firmly planted in the hearts and habits of a people that war, and even war of the most terrible and revolutionary kind, cannot uproot them bodily and throw them into the consuming flames. Many of the deepest roots of the law, even its main trunks, survive the conflagration, leaving it to the legislative hand to lop the decayed and burnt branches and to ingraft new and vigorous growths. The Revolution meant, above all things, a vast change in political power; the sovereign nation, one and indivisible, stepped into the place of authority held for so many centuries by the King. With this change came the realization of some of the leading philosophical ideas of the eighteenth century, the embodiment in law of the principles of political and civil liberty and political equality. Modifications of the private law, some of them following the teaching of the philosophers, such as Montaigne, Montesquieu, and Voltaire, also resulted from the transfer of political authority to the nation. The *droit d'aubaine* was 'abolished,' as being contrary to the principle of fraternity[3]; likewise abolished was the *retrait*, the right of buying back land sold by its proprietor, as being opposed to the individual's freedom to dispose of his own property; marriage was secularised, its indissolubility being rejected; perpetual paternal authority was also abolished, the consent of parents to the marriage of their children now becoming necessary only up to the age of twenty-one.

The period of the Revolution is important in legal history by reason of these and many other changes in the law; but even more important, viewed from the standpoint of to-day, is the period of the Consulate and Empire, for in that troublous time there was a reaction against the excessive reforming tendency of the Revolution, and an effort to preserve some of the best legal features of the *ancien régime* and to unite them with the solid and beneficial gains attained by the revolutionaries. In certain respects French juridical institutions now assumed

[3] Napoleon, in the Code Civil, re-established certain disabilities of aliens; but later French law has tended to revert to the idea of the revolutionaries.

their definitive shape, the tendency towards centralization and unity becoming accentuated.

Codification had been one of the main objects of policy in the monarchical and revolutionary eras; and although the great royal *ordonnances*, as well as the official redaction of the *coutumes*, had partially effected this purpose, the unification of the civil law had not been attained. In the Napoleonic era the work of codifying all branches of the law was resumed with the greatest energy. Napoleon himself, inspired by the ambition of being a great law-giver, inaugurated the project and took an active share in the labours of the jurists, Portalis and Maleville from the *pays de droit écrit*, Tronchet and Bigot de Préameneu from the *pays de coutumes*. 'I shall appear in history,' remarked Napoleon in his exile at St. Helena, 'with my Codes in my hand'; 'my Civil Code will live for ever.' It was in fact the enactment of the Emperor's Code Civil which achieved for France the unification of her private law.[4] In this single piece of legislation, Custom and the Roman Law, the two principal sources of the French law, were fused, largely by a method of selection.[5] Rules in regard to the disability of married women, marital authority, the community of goods between husband and wife, and succession to property, were derived in large measure from the customary law; while from the Roman Law there were taken the rules relating to obligation, property, and dowry. M. de Lapradelle has given the Code a character of its own by remarking that, 'child of the Revolution, the Code Napoleon retained the spirit of equality, but it discarded all the idle visions and violent measures of the Revolutionary Assemblies. Neither reactionary nor revolutionary, it aimed at progress, but avoided rashness.' The adoption of the Code Civil by many foreign countries, and its extensive influence on the world's legislation of the nineteenth and twentieth centuries,[6] intensify and expand Napoleon's remark that this work of his statesmanlike ambition would

[4] Unification of law, largely inspired by the Napoleonic codification, became one of the dominant characteristics of European legal history in the nineteenth century. See The Progress of Continental Law in the Nineteenth Century (a volume in the 'Continental Legal History Series,' ed. Wigmore and others, Boston), published in 1918.

[5] In his Introduction to Le Code Civil: Livre du Centenaire, 1904, vol. i, p. xxix, Sorel remarks: 'Le Code civil, c'est la jurisprudence du droit romain et l'usage des coutumes combinés ensemble et adoptés à la *Declaration des droits de l'homme*, selon les moeurs, convenances et conditions de la nation française.'

[6] See Le Code Civil: Livre du Centenaire, 1904, vol. ii; The Progress of Continental Law in the Nineteenth Century, 1918, pp. 1-343. See the latter volume, pp. 256-262, for a brief mention of the influence of the Napoleonic codification on the Anglo-American system of law.

remain his 'true glory' after the memory of his forty battles had faded away.

V.

The prominence of the Codes in the present-day law of France may very easily lead the lawyer, if he be unacquainted with legal history, to minimize the importance of the judicature as a factor in the development of the law. He should pause to reflect, therefore, on the activities of the Courts as makers of law in all the periods of French legal history. The legislator and the judge have worked hand in hand in the building up of the fabric of the law[7]; and in the main epochs of development both the legislator and the judge have received valuable help from the jurist who devoted himself to a presentation of the law in literary form. The historical foundations of this law-making function of the Courts are to be sought in institutional developments during the Merovingian and Carolingian epochs of the Frankish monarchy,[8] and in the system of justice evolved in *la période seigneurial et féodale*.[9] When, however, we come to study the long rule of the Capetian dynasty, we can see this function of the judicature in even clearer historical perspective. From the early days of the *curia regis*[1] to the Revolution the judicial institutions of the kingdom were not only interpreting and enforcing legislative enactments, they were also engaged, even when the King was regarded as the sole legislator, in the work of introducing new rules and principles into the legal system. Upon the form and substance of the customary law the Courts exercised a material influence[2]; they were one of the main instruments in effecting the adoption of rules from the Roman and Canon Law; while even in the shaping of the *droit royal* they played a considerable rôle.[3] Nor did this law-creative function of the Courts cease to be operative in legal life with the fall of the *ancien régime*. From 1789 to our own

[7] On the legislatures and courts of the monarchical period, see Brissaud, History of French Public Law (published in the 'Continental Legal History Series,' Boston), 1915, chaps. ix, xii.

[8] See Declareuil, op. cit. pp. 103-108, 122-127.

[9] M. Declareuil's lucid account of this period deserves study: op. cit. pp. 171-388.

[1] Declareuil, op. cit. pp. 450-456.

[2] Thus, for example, the judges of the Châtelet, gradually superseding the enquiries *par turbe*, settled the terms of the *Coutume de Paris*; while the Parlement de Paris, in hearing provincial appeals, applied the *Coutume* when provincial custom was silent or obscure. See La Coutume de Paris, by M. Olivier Martin, 1925, pp. 1-25.

[3] See, *e.g.* Declareuil, op. cit. pp. 825-826, 829-836, 851-885.

day more judge-made law has been introduced into the French system than many foreign lawyers suspect.

A striking illustration of this feature of French legal history in modern times may be found in the work of the Courts that were erected to protect the administrator against the encroachments of the ordinary tribunals; for these administrative Courts have not hesitated, as M. de Lapradelle has observed,[4] 'to defend legality against administrative arbitrariness, and [have] gradually abolished the old maxim—"the State, which is the source of law, is above the law."' Indeed, 'the "right of appeal against the abuse of power," an original creation of French jurisprudence [case-law], compels the government to pay the most absolute respect to the law, lest its enactments should be nullified.' Moreover, within the domain of private as well as of public law the Courts have shown the same tendency to be creators of law; by their decisions they have prepared the way for reform on the part of the legislature, and they have also supplemented the written law and adapted it to meet new social needs. Thus, in the words of M. de Lapradelle, 'when the system of insurance came into being, especially life assurance, which was not foreseen by the Code of 1804, case-law intervened to protect the insured against unreasonably severe clauses. Judicial theory co-ordinates the efforts of jurisprudence [case-law] to adapt, from a growing sense of justice, the rigour of the written law to the increasingly complex emergencies of life.'[5]

Another instance of the recent growth of judge-made law in France may be taken from the domain of civil responsibility. Conditions arise which were not foreseen by the framers of the Civil Code. The Courts do not discard the Code; but they aim to administer justice by introducing rules which are *au delà du code*, or, as it is expressed, *en marge du code*. As Mr. Justice Mignault, of the Supreme Court of Canada, has recently remarked, in speaking upon the subject of 'The Modern Evolution of Civil Responsibility'[6]: 'Under the influence of modern jurists, the course of [French] jurisprudence has been altered and new sources of law created which, without any action of the Legislature, are now full recognized as binding by the Courts.'

These striking evidences of judicial legislation in modern times are, however, but illustrative of a feature of development

[4] Modern France: A Companion to French Studies (ed. Tilley), 1922, p. 353.
[5] Op. cit. p. 356.
[6] See the Canadian Bar Review, January, 1927, pp. 1-18.

which has characterized French legal history throughout its whole course. The interest of English lawyers should be awakened by this fact. The history of the French judicature as a factor in legal growth, from the special point of view of its quasi-legislative activities, is, in fact, a subject which might profitably engage the attention of English historical jurists. Comparisons with the history of English case-law would throw into relief some of the more important similarities and differences between the processes of development within two of the leading European regions of law. The English and French materials for such a study are abundant. In both countries the work of collecting judicial decisions had its beginning centuries before the close of the Middle Ages; and in both countries this labour has never ceased. In dealing with 'jurisprudence,' or the law to be found in judgments of Courts, M. Declareuil mentions some of the early official and private collections of French cases; and his brief account awakens in the reader a lively interest in this extensive field of historical enquiry. Attention has been drawn elsewhere to the possibility of discovering, among the medieval French materials, collections of cases which correspond closely to our own Year Books.[7] But this particular quest is only one of the many attractions which the mass of French official and private *recueils* of judicial decisions offers to the investigator.[8] If the scholar who turns his attention to this matter be a trained and skilful lawyer as well as a learned historian, and if he be keenly alert to the possibilities afforded by studies in comparative legal history, he should make an important contribution to the history of the judicial office within the environment of Western civilization; and not the least valuable of the solutions which should emerge from his researches concerns the part which the Courts have played in legislation.[9] That many of the judicial tribunals of Europe have always proceeded beyond the narrow province of

[7] See the present writer's 'English Medieval Reports,' a short essay which serves as an Introduction to Bolland's Manual of Year Book Studies, 1925.

[8] On the *recueils* of periods prior to the Revolution, especially those of medieval times, see Declareuil, op. cit. pp. 825-826, 857-875; Esmein, Histoire du droit français (ed. 1906), pp. 736-739; Viollet, Histoire du droit civil français (ed. 1905), pp. 157-164 (valuable bibliography, pp. 163, 164). On the *recueils* of the century from 1804 to 1904, see Meynial's article entitled 'Les Recueils d'arrêts et les Arrêtistes,' in Le Code Civil: Livre du Cententaire, 1904, vol. i, pp. 173-204.

[9] The history of the *Rechtsprechung* of German Courts, as embodied in collections of *Entscheidungen*, as well as the history of judicial decisions in other European countries, would fall within the scope of comprehensive studies. Spain offers an attractive field for the study of judge-made law in its historical aspects. On its relation to the Código Civil, see the present writer's 'The Renaissance and the Laws of Europe,' in Cambridge Legal Essays (1926), at p. 164.

merely declaring existing law seems now to be one of the axioms of the new science of legal history. Restricting his studies at first to England and France, and viewing his subject in a broad way, by taking into account the likenesses and contrasts offered by the general as well as the legal histories of these two regions, the student of the judicature ought to be able to give us, by providing definite information as to the scope of jurisdiction, answers to some of the most alluring and complex problems in historical and theoretical jurisprudence, problems which scholarship has as yet only partially solved. From what sources, royal, corporative, popular, or other, have the several Courts derived their powers? In what periods, and to what extent, have the Courts exercised 'legislative,' 'executive,' and 'judicial' functions? Have they, in any epoch of history, merely interpreted and declared the existing law as they found it in customs and enactments? When, and to what extent, have they reached out beyond this purely judicial field of activity, creating and introducing into the law new rules which they have derived from extraneous legal sources, or from social and economic life, or from the dictates of reason and equity? Only in the light furnished by accurate answers to these historical enquiries can the true nature of the judicial institutions of England and France at the present day be understood; for in both of these countries, as well as in other parts of Europe, the Courts of Justice, which are among the most ancient and conservative of all the instruments of government, rest upon historical foundations which only a knowledge of the whole course of medieval and modern development will fully disclose. By subjecting to a searching historical examination the mass of judicial records and reports that has accumulated in both England and France, and by studying these sources of the law in their relation to the history of the enactments of legislatures, the quasi-legislative activity of present-day Courts, and the 'judge-made law' which results from it, will stand out in clear historical perspective.[1] The truth of history, thus revealed, will bring with it an enrichment of our juridical thought.

H. D. Hazeltine.

[1] One of the many striking illustrations of judge-made law in England is furnished by the history of the decisions of English Courts on questions of the conflict of laws. As Dicey remarked, in his appreciation of Westlake's book, this important branch of English law is 'almost wholly the outcome of judicial legislation.' See Memories of John Westlake, 1914, p. 18.

ESCAPING THE CREDITOR IN THE MIDDLE AGES.

AMONG the 'acts of bankruptcy' defined in section 1 of the present Bankruptcy Act (4 & 5 Geo. 5, c. 59) there are two—flight and 'keeping house'—which claim the interest of historical curiosities. Buried away deeply in the middle of the list of 'ifs,' they are not very often dragged out for use in modern petitions of bankruptcy; and in the American bankruptcy law, historically a product of the English system, they have been left out altogether. And yet, by the irony which even legal history can reveal, there was a time once when these two acts alone occupied the limelight that is to-day enjoyed by the modern 'fads' of fraudulent preferences and conveyances and voluntary declarations of insolvency. Indeed, it is to these two somewhat antiquated practices that English bankruptcy law owes its historical origin, for the lineage of our statutes on bankruptcy begins with the law, passed in 1542-3 (34-35 Hen. 8, c. 4), to deal solely with debtors who to escape their creditors would 'flee to parts unknown or keep their houses.' It might be of some interest, therefore, to inquire whence these two practices arise in medieval England, how they became so prevalent in the sixteenth century, and why it was that the common law could not satisfactorily deal with them. In the course of our study we shall also observe certain other avenues of escape that were open to the unscrupulous debtor of the Middle Ages.

1. It may be a source of comfort to the Englishman to know that the practice of fleeing in order to avoid one's creditors came originally from the Continent, where it had become a widespread and well-recognized custom long before it arose in England, and that even when it did appear in this country it was for a long time indulged in only by foreign merchants. In medieval Italy, France, Spain, Germany and the Netherlands, flight was the customary 'act of bankruptcy.' The earliest bankruptcy statutes of the Lombard cities—which formed the basis of the bankruptcy system of France [1]—use the term *fugitivi* instead of

[1] Cf. Renouard, Traité des Faillites (Paris, 1844), p. 20 ff.

the later *banca-rotti*.[2] So, the early bankruptcy laws in Spain were directed against debtors who fled with their goods —*se ausentan con caudelas agenos*, or *se alcen con mercaderias*.[3] Only later was the Spanish bankruptcy law made to apply to debtors who ceased paying their debts without absconding.[4] Again in Holland, the first bankruptcy statute—contained in the Perpetual Edict of Charles V (1540)[5]—seems to have been aimed principally at the *fugitiven*. In Germany the custom was equally widespread: 'Flüctig pflegt der Schuldner zu gehen, der seine Gläubiger nicht befriedigen kann.'[6]

In the medieval treatises of the Continental jurists, the phrase *foro cessit* is invariably linked up with the definition of a bankrupt,[7] and elaborate rules were developed for proving that a debtor had withdrawn or fled from the market-place.[8] Finally, the act of flight became little more than a legal fiction invoked by the petitioning creditor for the purpose of setting in motion the extraordinary process of bankruptcy, for, as in our modern law, mere insolvency was not a sufficient ground for a bankruptcy adjudication. There were no voluntary petitions in those days; the honest debtor could not ask to be declared a bankrupt. At the same time he could not be thrown into bankruptcy without having committed the usual 'act of bankruptcy,' namely, flight from the market-place. The only remedy, therefore, for creditors who wished to avail themselves of the bankruptcy procedure against an insolvent debtor who had not withdrawn himself was to assert that he had, and the Courts apparently overlooked the fictitious character of the assertion. Thus, when Straccha wrote his great treatise on the Italian law of bankruptcy in the sixteenth century he evidently regarded the phrase *foro cessit* as of little importance, for, although he still includes it in his definition of a bankrupt, he makes no comment on it whatever, though he dissects and minutely analyses every other word in the definition.[9] Moreover, it is easy to understand the purely formal value that was attached to the act of flight when one considers that in those days the fraud

[2] Cf. Lattes, Il Diritto Commercialle Nella Legislazione Statutaria, p. 309, and the various Lombard statutes cited in Pertile, Storia del Diritto Italiano, vol. vi, pt. 2, p. 392 ff, and footnotes.

[3] Códigos Antiguos de España (ed. by Alcubilla), vol. ii, Novisima Recopilacion, lib. xi, tit. xxxii, ley 1 (year 1480), and ley 2 (year 1502).

[4] *Ibid.* ley 5 (year 1548).

[5] Groot Placaat Boek, vol. i, p. 311.

[6] Seuffert, Deutsches Konkursprozessrecht, p. 7.

[7] The phrase was evidently borrowed by the Civilians from the Digest: 16, 3, 7, 2.

[8] Cf. Lattes, op. cit. p. 333, note 4.

[9] Straccha, Tractatus de Decoctoribus sive Conturbatoribus, ii, 1.

of the debtor lay in the mere fact that he was insolvent, rather than in his efforts to cheat his creditors. Insolvency was the original sin, not the 'act of bankruptcy.' *Fallitus ergo fraudator!* exclaimed Baldus in Italy, and his words found an echo in all the medieval treatises on bankruptcy.

Now, the Continental custom of fleeing in order to escape one's creditors did not become notorious in England until the sixteenth century. The first English Act against fleeing debtors, passed in the year 1350, was directed only 'encontre les Lumbardz.'[1] The law declared that if a member of one of the companies of Lombards trading in England fled from the country without paying off his creditors, the whole company would be liable for his debts. Coke apparently derived a great deal of patriotic solace from this Italian origin of the practice of fleeing, but in his zeal to exculpate his own countrymen he forced himself into an unnecessary exaggeration. The offence may have been at one time, as he says, 'a stranger to an Englishman, who of all other nations was freest of bankruptcy,' but the statement that one cannot 'find either any complaint in parliament, or act of parliament against any English bankrupt until the 34th year of Henry VIII, when the English merchant had rioted in three kinds of costliness, viz. costly building, costly diet, and costly apparell'[2] must be taken *cum grano*. A very early and striking example of flight by an English debtor is revealed in a petition submitted to Parliament in the year 1414 by 'three citizens and mercers of London,' praying for special relief against their debtor, 'Wm. Venour, citizen and grocer of London,' who had fraudulently conveyed his property and with the proceeds had fled beyond the seas—'soy ad esloigne outre le mier.'[3]

Coke's statement is nevertheless substantially true. The practice of absconding to avoid one's creditors did not become conspicuous among English merchants until the sixteenth century. But, again, it is hardly probable that the reason for this belated appearance was either the higher commercial integrity of the Englishman in the earlier centuries or that at the beginning of the sixteenth century he 'had rioted in three kinds of costliness.' The true reason is rather to be found in the fact that the common law had afforded the unscrupulous debtor other and more convenient methods of escaping from his creditors. What these earlier methods were and how they were gradually

[1] 25 Edw. III, stat. 5, c. 23.
[2] Inst. iv, ch. 63, p. 276.
[3] Rolls of Parliament, vol. iv, p. 39, item 21.

eliminated by legislation we shall discuss after we have dealt with the second of the two notorious practices that arose in the sixteenth century, namely, 'keeping house.'

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2. Unlike its companion, the practice of 'keeping house' was not a Continental importation. It was an indigenous product of English soil, and it owed its existence to the sanctity with which the common law had invested the Englishman's home. The maxim that a man's house is his castle—*domus sua cuique est tutissimum refugium*[4]—was recognized and consecrated by English law from the earliest days. Although the first case recorded in the Year Books in which the rule against breaking into a man's house for the purpose of executing civil process was laid down, is the 18 Edw. IV, 4, the rule was undoubtedly well established long before that time, for already in the reign of Edward II we find the Courts apparently laying down an exception to the rule in cases where the process involved the King's interests[5]—an exception which has been religiously maintained down to the present day.

The Civil Law, it is true, had also paid a special regard to a man's house—*nemo de domo sua extrahi debet*[6]—but the Continental countries had never carried the principle to the extremes to which the English Courts had. In none of the systems of execution existing on the Continent in the Middle Ages do we find any rule against breaking into a man's house for the purpose of seizing his property in lawful execution. The ordonnance promulgated by Louis VI in the year 1134 is a typical expression of the licence which was afforded to the creditor on the Continent—he could seize his debtor's goods *wherever he could find them:*

'ubicumque et quocumque modo poterunt, tantum capiant, unde pecuniam sibi debitam integre et plenarie habeant.'[7]

Moreover, to seize the debtor's goods, wherever they might be, the creditor did not even require the authority or intervention of a public officer. He could go himself to the man's house and privately seize whatever he could lay his hands upon.[8] 'Private seizure,' says Huvelin, 'existed from the end of the Frankish Period down into the Middle Ages.'[9]

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[4] Cf. *Semayne's Case*, V. Coke's Rep. 91.
[5] Cited in Fitzherbert's Abridg., Execution, pl. 152.
[6] Dig. 50, 17, 103.
[7] Recueil Général des Anciennes Lois Françaises, Tome i, p. 143.
[8] Cf. the editor's note in the Recueil Général to the ordonnance cited above: Cela nous marque que cet arrêt se faissait par voie de fait et d'autorité privé.'
[9] Essai Historique sur le Droit des Marches et des Foires, p. 449.

The practice of 'keeping house' in order to escape one's creditors was, therefore, unknown outside of England, and a very striking proof of this may be seen in a letter of protest addressed to Charles IX of France, by a group of French merchants who had been trading in England and had been forced to leave the country because of certain 'torts et griefs et aultres incommoditez' which they had suffered while there. What had astonished and grieved them most was the practice of 'keeping house'—

> 'The English merchant,' they wrote, 'has this privilege, that when he has bought goods and intends to become a bankrupt—he can retire into his house, or even into his shop, provided that the door is closed with a lock or some barrier; and the bailiff cannot touch his goods, nor can any one disturb him nor demand any account from him, nor arrest him or even talk to him, even though the poor ruined creditors may see the bankrupt in his house, with his wife, his factors and servants, publicly selling their goods in front of their eyes, without being able to attach these goods or any of the debtor's real or personal property.'[1]

But, although native to England, the practice of 'keeping house,' like that of flight, did not become notorious until the sixteenth century. Of course, the retarded commercial development of England had something to do with this, and perhaps also the rioting 'in three kinds of costliness' which marked the Tudor period. But a more direct and plausible reason is to be found in the fact that, prior to the reign of Henry VIII, the unscrupulous debtor had far more convenient means at hand of escaping his creditors than by leaving the country or confining himself within the four walls of his house. Let us see what these avenues of escape were and how they were gradually blocked up by legislation, leaving only flight and keeping house to be dealt with when the first bankruptcy statute was passed in 1542.

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3. Suppose that the debtor had fraudulently hidden or conveyed his assets, so that there were none in sight when the creditor came to levy his execution. The only remedy open to the creditor—there were as yet no effective statutes against fraudulent conveyances—was to imprison the debtor until he was willing to disclose his assets or satisfy his obligations. This

[1] The letter, which was later enrolled in the Register of the Hôtel de Ville at Paris, is cited in the Appendix to Vol. ii of Pigeonneau's Histoire du Commerce de la France, from which the above extract has been translated.

remedy of imprisonment was at first provided, for the use of merchants only, through the system of recognizances introduced by the Statute of Merchants in the year 1285 (13 Edw. 1, st. 3). Only later and gradually did the common law itself develop a system of imprisonment for debt, by the rule that any person who had obtained a judgment in an ordinary action for debt could get a writ of *capias ad satisfaciendum* to obtain execution of the judgment.[2]

But the wily debtor of the fifteenth century had discovered an ingenious way of securing his release from jail without satisfying his creditor. He would have himself taken out of custody and brought into the Court of Chancery on a writ *de corpus cum causa*, and would then 'by shewing forth divers indentures and other things in defeasance of such recognizances,'[3] obtain a writ of *scire facias* directed to his creditor and summoning the latter to appear before the Chancellor to answer this new petition. In the meanwhile he could secure his release from Chancery on a bond endorsed by a surety and payable on default to the King. But, apparently, such sureties would frequently be discharged from liability on this bond through the King's pardon, and the result was that the creditor was left without recourse either against the debtor or his surety. This avenue of escape was, however, removed when a statute was passed in 1433, whereby the sureties on such bonds in Chancery were compelled to bind themselves not only to the King but to the creditor as well.[4]

But the avenue that was sought most frequently by the fraudulent debtor of the fourteenth and fifteenth centuries was that which led to the Sanctuary. The places which were deemed 'sanctuaries' were extremely numerous, easy of access, and in some cases veritable cities in size. The most popular was the one at Westminster—'big as a fourth of the whole city.'[5] As a result, 'individuals burdened with debts and unable to honor them without ruining themselves, would get rid of all their goods by conveyances, infeudations and fictitious sales, and then, when they were apparently possessed of no more property, would take refuge in certain very spacious sanctuaries, like those at Westminster or Saint-Martin, and lead an extravagant life, thanks to the secret revenues which came to them from their fraudulent transactions.'[6] In the latter part of the fourteenth

[2] For the way in which this rule was developed by the common law Courts, cf. Holdsworth, History of English Law, vol. viii, p. 231.

[3] Preamble to 11 Hen. VI, c. 10.

[4] 11 Hen. VI, c. 10.

[5] Reville's article on 'Abjuratio regni,' in the Revue Historique, vol. 50, p. 37.

[6] *Ibid.* p. 31.

century various petitions were addressed to Parliament for the curbing of this notorious practice,[7] but apparently they were of no avail. Finally, in 1379, a statute was passed whereby the fraudulent conveyances of persons who took refuge in a sanctuary were declared null and void, and their property rendered liable to execution by their creditors.[8] But whatever goods the debtor had actually taken with him into the sanctuary were still immune, and his own person was still safe from arrest.

In the latter part of the fifteenth century, however, as M. Reville has shown,[9] the general privilege of sanctuary was becoming attenuated through the widespread opposition of public opinion both in England and on the Continent. In 1487 Pope Innocent VIII had issued a Bull denying the privilege to dishonest debtors.[1] In England it was not until the reign of Henry VIII that important measures were taken to restrict the privilege—although, as a matter of fact, the changes that were actually made 'prolonged its life for nearly a century.'[2] At any rate, the practice had become sufficiently restrained before the middle of the sixteenth century to be overlooked when the legislators framed the first bankruptcy statute in 1542. The only practices, therefore, which called for attention were flight and keeping house, both of which had arisen only when the earlier and more convenient methods of escaping one's creditors had been to some extent curbed by the Legislature.

But why was the common law inadequate to deal with these two later practices? In the case of keeping house, the answer has already been given in our earlier discussion of the subject. The common law stubbornly refused to give up its ancient protection of a man's house, even where the privilege was being patently abused. Its policy was 'that a greater evil should be avoided for a less, and that a less should give way to a greater.'[3] In the case of flight from the realm, the common law was of no avail to the creditor, for the debtor who had thus fled was declared an outlaw, and an outlaw's goods escheated to the Crown. Only by special petition to Parliament (as we have already seen) could creditors occasionally obtain some relief for themselves in such cases. It is therefore clear why a statutory remedy became necessary. Under the bankruptcy statute of Henry VIII the property of an outlawed debtor was to be

[7] Cf. Rolls of Parliament, ii, p. 369; iii, p. 37.
[8] 2 Rich. II, stat. 2, c. 3.
[9] Op. cit. p. 32 ff.
[1] *Ibid.* p. 33.
[2] Holdsworth, op. cit. vol. iii, p. 306.
[3] *Lee* v. *Gansel* (1774), 1 Cowper 1, at p. 5.

'distributed amongst his creditors equally and indifferently rate for rate.'[4] There was no definite provision included to give the bankruptcy officials the power of breaking into a bankrupt's house, but apparently it could be done under the almost unlimited powers given to the officials. At any rate, the power must have been exercised by the commissioners appointed by the bankruptcy 'lords,' as we learn from the bankruptcy statute which was passed in 1623 and which definitely gave the commissioners the power 'to break open the bankrupt's house, chambers, shops, ware-houses, doors, trunks, or chests—and to seize upon and order the body, goods, chattels, ready money and other estate of such bankrupt—as shall be thought by the commissioners necessary.'[5]

I. Treiman.

[4] Section 5.
[5] 21 Jac. I, c. 19, s. 8.

THE GROWTH AND SCOPE OF EXTRA-TERRITORIALITY IN CHINA.

II.—*The Established System and the Limits of Extraterritoriality.*

THE extraterritorial jurisdiction of the Powers, as exercised at present in China, rests mainly, but not entirely, upon the treaties concluded between them and China. Thus, Sir Francis Piggott, a former Chief Justice of Hong Kong, observes that the 'treaties show a very incomplete foundation for the structures resting on them.' Extensions of jurisdiction have taken place from time to time, as a result of agreements concluded between local authorities (especially at Shanghai), such agreements being acquiesced in by the Chinese Government. Another important point is that the exercise of extraterritorial rights by the various Powers is not uniform. Although the 'most favoured nation' clause might possibly have been construed by some States as permitting them to apply the provisions of the Chefoo Convention to their own subjects, no such claim has ever been made, and the system of administration exhibits considerable variations between nation and nation.[1]

The Courts exercising extraterritorial jurisdiction are Consular Courts. Sometimes there is a right of appeal from the Consular Court to the Minister at Peking. Other Powers[2] provide that where grave crimes are committed the offenders must be sent home for trial and punishment after a preliminary enquiry. Others again allow an appeal to Colonial Courts. The British and American systems are again different. By an Order in Council of October 24, 1904, the British Supreme Court for China was reconstituted,[3] with power to hear appeals from all British Consular Courts in China. A further appeal may be taken from this Court, where more than £500 is involved, to the Privy Council. This Court has also an exclusive jurisdiction within the consular district of Shanghai, and a concurrent original jurisdiction with all other Consular Courts in China. An Act of Congress of June 30, 1906, created a 'United

[1] See on this point, Quigley, article cited p. 53, quoting M. Padoux.
[2] *E.g.* Spain, and Russia until the abolition of her extraterritorial rights.
[3] It was established by an Order in Council of 1865.

States Court for China,' at the same time severely limiting the jurisdiction of the American Consular Courts in China. The American Consuls now retain jurisdiction in civil cases where the amount of the property involved does not exceed five hundred dollars, and in criminal cases where the punishment for the offence cannot exceed a fine of one hundred dollars or sixty days' imprisonment. In these cases there may be an appeal from the Consular Court to the Supreme Court. In all other cases the Supreme Court has exclusive jurisdiction. An appeal lies from the judgments of this Court to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and thence to the Supreme Court of the United States 'in the same class of cases as those in which appeals and writs of error are permitted to judgments of said Court of Appeals in cases coming from district and circuit Courts of the United States.' [4]

Certain general principles govern the application of law by the various Consular Courts. Of these the most important is that which directs that the law applied is that of the defendant in any particular action. Thus, in disputes between Chinese alone, the Chinese Courts have exclusive jurisdiction. In suits between subjects of a single treaty Power, the Consular Court of that Power has jurisdiction. Where a Chinese proceeds against a foreigner, the Consular Court of that foreigner has jurisdiction; and in cases involving the subjects of different treaty Powers, the Consular Court of the defendant has jurisdiction. Hence arises one of the chief defects of consular jurisdiction. There is no harmony between the decisions of Consular Courts of different Powers. A case involving a Chinese and a foreign defendant may be tried and adjudged one way in one Consular Court, a similar case involving another Chinese and the subject of another treaty Power may be decided another way in the Consular Court of that Power—and so on. Another principle governing extraterritorial rights in China is that they protect the national of the treaty Power, not only in the treaty ports, but wherever he goes in China. Moreover, extraterritoriality protects the subjects of treaty Powers from the liability of having their houses or vessels within the treaty ports searched.

The law administered in the Consular Courts is the 'law of the officer trying the case.' [5] This statement has given rise to a certain amount of controversy. The procedural law is admittedly that of the Power having jurisdiction in the case. Again, it is clear that subjects of treaty Powers must obey the

[4] Section 3.

[5] Chefoo Convention, Art. III, s. 2.

laws of their respective countries, but the further question arises, how far are they bound to obey, not only local ordinances, but also the general law of China? It is now clear from decided cases that a subject of a treaty Power in a treaty port must conform to all those ordinances which the local authority passes for the good government of that area. Moreover, the subject of a treaty Power anywhere in China cannot act in such a way as to defy territorial laws relating, more especially, to public health or public safety. Should he do so, he may be subjected to reasonable restraint. Again, if he violates customs laws, his vessel and goods may be confiscated. Dr. Koo, however, goes further, and contends that extraterritoriality entitles a treaty Power 'to exercise so much authority over their nationals in China as is necessary to enforce effectively, by judicial methods, the laws declared to be in force by the Emperor of China.'[6] This seems an overstatement. Mr. Seward's contention that while foreigners offending against laws necessary for China's safety and convenience should be punished, 'it appears difficult to admit the broad proposition that they are amenable to Chinese law in the same sense as natives of China are,'[7] is much nearer the mark. As far as the law of real property is concerned, however, all systems are agreed that rights should be determined by the *lex situs*. Accordingly, in the case of *MacDonald* v. *Anderson*,[8] Mr. Justice Bourne held that 'the Court administers the law of England (1865 Order-in-Council, Art. 5), but what is the law of England in regard to immovable property situated within the dominions of the Emperor of China? Undoubtedly that rights in respect of such property shall be governed by the *lex situs*, that is, by the law of China.'[9]

[6] Status of Aliens in China, p. 217.

[7] Seward to State Department, U. S. Foreign Relations 1880, p. 146.

[8] Tientsin 1904. See Hinckley, American Consular Jurisdiction in the Orient, pp. 250-253.

[9] Other portions of the same judgment, bearing on the point, are well worth notice. 'The principle that land and its incidents are subject to the *lex situs* is not arbitrary, but founded upon cogent considerations of justice and convenience—one of the most obvious of which is that contiguous plots of land should be subject to the same law in regard to such incidents as prescription and servitudes. The land of British subjects at Tientsin is often conterminous with that owned by Frenchmen, Germans and subjects of other Treaty Powers. If the home land law of each proprietor is to apply to his land at Tientsin there will be different periods of limitation, prescription for servitudes, etc., according to the nationality of the owner for the time being.' Later, he considers the application of the Privy Council's decision in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* [1901] A. C. p. 373, in which it was held that the local law of Zanzibar applied to real property held by British subjects there. 'That case,' he observes, 'seems by analogy to establish two propositions, that Chinese law ought to be applied by His Majesty's Courts in China to the incidents of land in China, and that His Majesty's judges in China ought to take judicial notice of Chinese written law. In regard to the first, the greater

A difference between the extraterritorial rights of the treaty Powers in China and those formerly enjoyed by Europeans in Turkey is that the right of protecting the subjects of a non-treaty Power does not now exist. Until 1908, apparently various Powers had taken the nationals of non-treaty Powers under their protection. Thus both Turkish and Swiss subjects were protected by France and Germany; Greeks and Siamese by France; Serbs, Montenegrins, Roumanians and Bulgarians by Russia; and Luxemburghers by Belgium. In 1908, however, China denounced this practice,[1] and the privilege of protection is not claimed at the present moment by any Power.

Dr. M. J. Bau [2] notices three types of foreigners who have a special status as far as extraterritoriality is concerned. The first type includes the Koreans in Chientao, and their position depends upon the treaty of 1909 between Japan and China,[3] Article 4 of which declares: 'The Korean subjects residing on agricultural lands within the mixed residence district to the north of the River Tumen shall submit to the laws of China and shall be amenable to the jurisdiction of the Chinese local officials. Such Korean subjects shall be accorded by the Chinese authorities equal treatment with Chinese subjects, and similarly, in the matter of taxation and all other administrative measures, they shall be placed on equal footing with Chinese subjects. All cases, whether civil or criminal, relating to such Korean subjects shall be heard and decided by the Chinese authorities in accordance with the laws of China, and in a just and equitable manner. A Japanese consular officer or an official duly authorized by him shall be allowed freely to attend the Court,

part of Chinese written law would be void and inoperative in an English Court as inconsistent with the policy of English law (Dicey, Conflict of Laws, pp. 29 and 32. *Fitzgerald, In re* [1903] 1 Ch. 941). Further, Chinese land law consists almost entirely of local custom: a great deal of English law has been uniformly followed for half a century by His Majesty's subjects in China, and has thus acquired the force of Chinese law, *e.g.* testamentary disposition of land in China according to the English form, and English forms of conveyancing. Where there is no custom, the duty of the Chinese judge is to decide according to good conscience. The British Court would, I conceive, in such cases draw on the civil law as developed by modern continental codes and text-writers, including our own law of personal property, which comes in some respects from the same source (cf. Maine's Ancient Law, p. 283). If a land law so derived is thought too uncertain to support the large foreign commercial interests now centred in Shanghai and Tientsin, legislation alone can supply the remedy. Rights of limitation and servitudes might be governed by Land Regulation approved by the Treaty Powers, and succession *ab intestato* by Order-in-Council. In regard to judicial notice, there is in fact no Chinese written civil law. Judicial notice might be taken of the Penal Code of the present dynasty, translated by Staunton, London, 1810, but custom would have to be proved by evidence.'

[1] On the protection of subjects of non-treaty Powers, see Les Droits Conventionnels des Etrangers en Chine, G. Soulie de Morant, Paris, 1916, pp. 126-129.

[2] The Foreign Relations of China, pp. 293-294.

[3] MacMurray, p. 796.

and in the hearing of important cases concerning the lives of persons previous notice is to be given to the Japanese consular officers. Whenever the Japanese consular officers find that a decision has been given in disregard of law, they shall have right to apply to the Chinese authorities for a new trial to be conducted by officials specially selected in order to assure justice of the decision.'

The second class of foreigners with a special status includes those who are in the service of the Chinese Government. As a rule, they remain within the jurisdiction of the Consular Courts of their country, but they are not civilly liable in those Courts for acts done in an official capacity, and they may plead an act of State in reply to a criminal charge. Their superiors, however, have authority to enforce their obedience.[4] Thirdly, Dr. Bau notices that Chinese citizens in the employment of foreigners, though still subject to Chinese jurisdiction, cannot be arrested without notice to the employer's Consul.

A peculiar problem regarding the position of foreigners with extraterritorial rights in China in war-time arose during the Russo-Japanese War. Both Russia and Japan possessed extraterritorial rights in China. Both of them, moreover, were fighting on Chinese territory. This rendered it impossible for

[4] With respect to the position of a foreigner in the military service of China, Bau states that ' by virtue of the necessity of the situation, they are supposed to have voluntarily waived their extraterritorial protection and placed themselves under the jurisdiction of the territorial sovereign ' : op. cit. p. 293. He cites in support two cases : (1) The Case of General Burgevine, 1865, and (2) the Case of the U. S. Citizens in the Proposed Attack on Formosa, 1874. These cases, however, do not altogether support Dr. Bau's contention. In the first, Burgevine, an American citizen, entered the Chinese military service during the Taiping rebellion and was compelled to resign for various acts. He thereupon entered the Taiping service. The Chinese Government offered a reward of Tls.3,000 for the delivery of Burgevine, alive or dead. A letter signed by eleven Consuls, including those of Great Britain, the United States, and France, thereupon protested against any intention by arresting or judging him otherwise than according to American law. To avoid complications, the American Consul arrested him, and deported him to Japan. He afterwards ' joined the Taipings a second time, and was then taken prisoner. The American Consul demanded his surrender, but was informed that he had been accidentally drowned on the way. Meanwhile the American Government renounced jurisdiction over Burgevine, but it was to be " understood to rest upon our own voluntary consent upon the grounds of national honour, and not from Chinese right under treaty stipulations." ' (See further, Morse, vol. ii, pp. 85-89.) In the second case Japan proposed to send an expedition to Formosa. The episode is described by Morse as follows : ' The American Government at first took no action to restrain Americans from engaging in the Japanese service; but, at the last moment forbade the use of American ships as transports. There was more hesitation in prohibiting American officers from lending their services; but, when China had finally decided to oppose the expedition, the American Consul at Amoy sent them a formal order to withdraw—an unauthorized order to which they paid no attention. On August 6, however, General Le Gendre was arrested by the Consul at Amoy, was sent to Shanghai, and was there released, " as it seemed that a prosecution, before [the Consul] under the neutrality act must fail "; at the same time Commander Cassell's leave was revoked ' : op. cit. vol. ii, p. 273.

China to carry out her duties as a neutral in full. At the same time she made an honest effort to remain as strictly neutral as was possible under the circumstances. The question then arose, What was the legal position of Russians interned in China for breaches of neutrality (*e.g.* after Russian vessels had taken refuge in Chinese ports, and had stayed beyond the time limit), remembering that they enjoy extraterritorial rights? Captain W. F. Tyler, Coast Inspector, in a memorandum on 'China's Neutrality in the Russo-Japanese War,' prepared for presentation at the International Congress at The Hague, observes, 'China in respect to neutrality was acting not only for herself, but Internationally. She became the constable of International Law. Having these high duties of sovereignty to perform, it was obviously requisite for her to have the corresponding high sovereign powers necessary to enable her to fulfil these duties. If interned men were free from her jurisdiction, how could she be responsible for them? And responsible she had to be under International Law. She therefore considered that the prior obligation held and that consequently extraterritoriality could not be allowed to interfere with her neutral functions. In the later cases of internment there was a formal submission by the officers and men to "the control which is customary in such cases."'[5] Captain Tyler further points out that China was aware that her judicial methods were unequal to the emergency, and she therefore delegated to the local Russian officials the power of disciplinary control, to be exercised under her superintendance, reserving the right, however, to take any action made necessary by circumstances. Thus, men who refused to give parole were detained as prisoners on a Chinese man-of-war. Russia tacitly agreed to this, but claimed full extraterritoriality as far as criminal jurisdiction was concerned. One case only occurred of this type. A Russian sailor from the *Askold* murdered a Chinese, and the Russian authorities refused to allow the Chinese authorities to superintend at the trial. As the accused was never in Chinese hands, China could only protest at the Russian control of the trial. China declared that in future cases, when the prisoner was in their hands, he should be tried either at the Consular Court with a Chinese officer on the bench, or on a Chinese man-of-war, by the Russian Consul. No case occurred, however, for the rule to be applied.

In the treaty-ports, and especially in Shanghai, the question of jurisdiction over the Chinese early became a question of

[5] Morse, op. cit. vol. iii, Appendix G, p. 481.

importance. In Shanghai, it was recognized from the first that the treaty Powers ought to have power to deal with Chinese offenders, as well as their own, within the limits of the Settlement. Thus, Messrs. Lanning and Couling observe: 'The Mixed Court did not come into existence till 1863, though the great influx of refugees in 1853-4-5 made it imperative that British and American Consuls should—spite of all treaty stipulations and frowns from Ministers—take cognizance of native offences against Settlement regulations. This they did in full accord with such Imperial local officials as were in the neighbourhood at the time, and in 1855 we note that as least 500 cases were heard by the British Consul, of which four were for murder, 103 for felony, and 13 for kidnapping. Serious offenders were sent to the city, the rest went to chaingang.'[6] Dr. Morse, also dealing with the question of jurisdiction over the Chinese in the early days of the Shanghai Municipality, writes: 'The Chinese authorities were ready enough to tax, and would willingly have administered justice if the administration could, as generally in China, have been associated with the taxing power; but without this power, justice is an expense to the Government, and in Shanghai, during the rebellion,[7] it was neglected. The necessary police-control was exercised by the treaty-power consuls, sitting as police magistrates, and there is no record of any Chinese magistrate exercising, or being allowed to exercise, the judicial function within the limits of the settlements. Civil suits were commonly settled by guild action or by friendly arbitration; but when mixed suits came before a Court, it was before a consular court. One such case occurred at Hankow as late as May, 1864, when the Oriental Banking Corporation brought suit before the British consul against Yen Choong and Wye Kee for enforcement of a contract; judgment was given for the plaintiff, the Chinese defendant being ordered to pay Tls. 68,232, which was paid. This method was one which could not continue, and yet the nascent republic of Shanghai was reluctant to admit the Chinese mandarin within its limits. The solution was found in the creation in 1864 of a "mixed court."'[8] Various plans to deal with the Chinese and the subjects of non-treaty Powers in the Settlement were considered in 1863, but most of them were unworkable, as the powers required by the tribunals were in excess of what the Chinese authorities were prepared to give. Finally, Sir Henry Parkes, the British Consul at Shanghai, put forward a scheme

[6] History of Shanghai, p. 366.
[7] *I.e.* 1851-1864.
[8] Op. cit. vol. ii, p. 133.

for the establishment of a Chinese Court with foreign assessors within the Settlement. The proposed Court would not only be in conformity with treaty-stipulations, but it would be modelled on the Mixed Tribunals already established on the frontiers of Russia and China, and composed of two Judges, Chinese and Russian, with equal rights, and administering the customs of the locality in which a case originated.[9] On May 1, 1864, therefore, a Court of this type, comprising a deputy of the local Chinese authority and a British Vice-Consul, Mr. (later Sir) Chaloner Alabaster, was opened at the British Consulate. An important defect of this tribunal was that its function was absolutely undetermined.[1] 'It was entirely left to the free initiative of the men who constituted its Bench. Indeed, the earlier period of the functioning of the new tribunal was characterized by the untiring efforts of Mr. Chaloner Alabaster, the first British Assessor of the Mixed Court, to fill the gap in its constitution, and his exceptional personality pre-determined the whole course of the development of this new civic enterprise.'[2]

In its early days, the jurisdiction of the Court extended to police cases, which the Chinese deputy tried alone, to criminal cases against Chinese, involving foreigners, or against subjects of non-treaty Powers—in which cases the deputy sat with a foreign assessor—and to civil cases, which were either between Chinese, when the Chinese deputy sat alone, or cases by foreigners against Chinese, when the Chinese deputy and the Consular assessor again sat together. In 1869 a set of Rules of the Mixed Court was introduced. As a result of their adoption, the Court was presided over by a deputy of the Taotai having the rank of a Sub-Prefect. In all cases concerning a foreigner, a Consul or his deputy was to sit; but where Chinese only were concerned, the Sub-Prefect should sit alone. Chinese in the service of foreigners could be summoned only with the consent of the Consul of the employer's nationality. Criminal charges against Chinese where the punishment was death or banishment were to be heard by the District Magistrate of Shanghai. Suits between natives and foreigners were to be decided in accordance with treaties. 'When the foreigner has no Consul, the Sub-Prefect, sitting with a foreign (Consular)

[9] A. M. Kotenev, Shanghai, Its Mixed Court and Council, p. 50. He adds: 'In course of time these courts have proved satisfactory. In 1903 over 1,500 cases were adjudicated in Eli so that in 1905 this system was extended to Kashgar.'

[1] *Ibid.* p. 51.

[2] *Ibid.* p. 54.

Assessor, shall try the case, submitting the decision for the consideration of the Taotai. Should either party to a case be dissatisfied with the Sub-Prefect's decision, application for a new trial can be made to the Taotai, or to the proper Consul.'[3] In criminal cases, 'unrepresented foreign offenders will be tried and sentenced by the Sub-Prefect, the finding being then submitted for the Taotai's approval, who will consult with some Treaty Power Consul on the subject. Where the offenders are Chinese, the Sub-Prefect will inflict the proper legal punishment.'[4] Kotenev points out that indefinite wording of the clause relating to the position and powers of the Consul or his deputy contained the cause for many future misunderstandings.[5]

On July 6, 1867, Mr. Chaloner Alabaster left Shanghai, being transferred to Canton, and towards the end of 1868 the Mixed Court was transferred from the British Consulate to the more directly Chinese environment of Nanking Road. These two events, seemingly unconnected and unimportant, had a considerable influence upon the history of the Court. In his new surroundings the Chinese magistrate felt himself to be not only the representative but the advocate of his people in their dealings with the foreigner, and his attitude towards the assessors of the Court became steadily more rigid. Every Chinese magistrate was not only a judicial officer, but an administrator also. The Mixed Court magistrate was no exception to the rule, and as the deputy and representative of the Taotai, his administrative power was therefore not inconsiderable. 'Of course, he could not pretend to exercise that administrative authority within the boundaries of the land set aside for the residence of foreigners, who, according to the agreements with the Chinese Government, exercised it themselves, but he accepted the rôle of a mediator between the European community and the natives in the Settlement on the one hand, and between the Taotai and the native population on the other. He issued proclamations under the instructions of the Taotai and in his own name, appealing to the mind of the Chinese people and impressing them with his authority to deal with matters affecting the Settlement. He assumed even the rôle of an interceder on behalf of his countrymen living in the Settlement, and often was approached to that effect by various Chinese bodies, who considered him as an official of the Government sent into the Settlement to represent native interests. In fact, there was little left to be argued upon. The Mixed Court

[3] Art. 6; Kotenev, op. cit. p. 71.
[4] Art. 7; *ibid.*
[5] Op. cit. p. 72.

was a Chinese Court, the Yamen of the Official North of the Yang King Pang, and as such was entitled to claim the rights which belonged to every Chinese Court. But some of the magistrates went too far in playing the rôle of interceders for their countrymen. They openly declared in Court that they were anxious to assist the Chinese defendants against the foreigners suing them. Of course, an extravagant magistrate easily could be brought to order by his superiors, if they wanted to do this, but it was no secret that the Mixed Court Magistrates were backed by the City Magistracy, whose views they expressed on the Bench. In fact, they were marionettes in the hands of their superiors and powerful merchant guilds, who used them as a tool to regain lost position and to get a firm footing in the Settlement.' [6]

Mr. Alabaster, at a meeting of the Consular Body in Shanghai in 1875, convened to discuss the possibility of improvement, expressed the view that unless the constitution of the Court were altered to give more power to the assessors, and unless a new Chinese Code were promulgated, there was little real hope that the Court would function satisfactorily. About the same time also the foreign press in Shanghai expressed profound dissatisfaction with the existing state of affairs, whilst various important bodies of citizens sent memorials on the same topic to the Diplomatic Body at Peking.[7] Ultimately the Chefoo Convention of 1876 effected some modification of the position. Whilst recalling that Chinese subjects committing crimes towards British subjects shall be tried by Chinese law, and reaffirming the principle that the defendant's nationality determines the law of the case, it declares that the position at Shanghai has been found unsatisfactory, for 'the Officer presiding over it, either from lack of power, or dread of unpopularity, constantly fails to enforce his judgments,' and therefore provides that foreign representatives shall confer with the Chinese Government upon the measures needed for the more effective administration of justice at the ports open to trade. Unfortunately, the Chefoo Convention failed to settle the vexed question of the position of the assessors. It observes that 'the official of the plaintiff's nationality merely attends to watch the proceedings in the interests of justice.' If the officer so attending is dissatisfied with the proceedings, he is empowered to protest against them in detail—but the Convention does not say to whom. All things considered, therefore, the Convention

[6] Kotenev, op. cit. p. 76.
[7] *Ibid.* pp. 77-79.

failed even to envisage the real problem at Shanghai properly. It remained to be seen whether the conference of Ministers could do any better.

When the Mixed Court was first founded, some hope was expressed that it would merely be one of a number of such Courts which would gradually develop a system of Westernised law for China, somewhat in the same way as the Mixed Courts in Egypt ultimately succeeded in rebuilding Egyptian law upon a Western framework. Although other Mixed Courts have been established from time to time in China—and notably at Amoy and Hankow [8] they have not developed in the way that at one time it was hoped they would. Immediately before the Conference, however, the project of introducing a new Western Code into China through the Mixed Courts was revived and discussed. The idea is plainly reflected in the third section of Sir Robert Hart's 'Proposals for the Better Regulation of Commercial Relations, 1876.' He writes: 'With reference to the existing system generally: Where questions affecting Persons have arisen, foreigners have complained that their Chinese assailants have not been arrested, or, if arrested, have either not been punished or have been insufficiently punished, or that the real criminals have been allowed to escape and other friendless wretches substituted, or that, where several ought to have been alike punished, only one has been dealt with, etc.'

'On the other hand, Chinese in turn complain that foreigners assault Chinese with impunity; that what China calls murder is invariably excused or made manslaughter by foreign Courts; that where Chinese law prescribes death the offending foreigner is sentenced to only a short imprisonment; and that, while the foreigner insists that Chinese shall be punished with death where foreign life has been lost, he, on his side, expects China to accept a small sum of money in lieu of a death punishment where Chinese life is lost, etc.'

'The foreigner charges the Chinese official with accepting bribes, and urges that Chinese torture will make any innocent person admit that he is a guilty criminal; similarly, the Chinese are not convinced that Consuls do not take bribes, and point out that the foreign mode of examining witnesses does not invariably elicit the whole truth, and that trial by jury does not always do justice. Moreover, while the foreigner protects the accused by throwing the onus of proof on the accusers, Chinese will not

[8] Another Mixed Court was established in the French Concession (which has always remained distinct from the International Settlement) at Shanghai.

condemn or punish till the offender has himself confessed his guilt.'

'When these complaints are carefully looked into, it becomes evident that what gives common offence to both sides is not that crime is not considered crime, or that the laws do not provide punishments for crime, but that there is no common and uniform procedure.' [9]

He then discusses the complaints made concerning questions of Property and Revenue coming before the Chinese and foreign Courts for settlement, and reaches the same conclusion—that a common procedure is required.[1] Accordingly, he submits four sets of proposals with the object of bringing the administration of the two types of legal systems into closer contact. The first set contemplates the greatest changes. It suggests that disputes between foreigners alone shall be tried by the foreign authorities as before. All questions affecting person or property and customs cases involving confiscation or a fine concerning both foreigners and Chinese, however, shall be tried in accordance with a common code, to be drawn up. Courts to administer the Common Code are to be established at each treaty-port, each Court to be presided over by one of the expectant Taotais, appointed by the Governor of the province, and a foreign co-Judge in Chinese pay. The foreign co-Judges are to number five in all. In cases of importance there are to be two assessors, one named by the plaintiff, and the other by the defendant. These Courts are to have power to summon natives and foreigners alike as witnesses, and have power to punish for perjury and contempt of Court.[2] In all cases involving not more than a certain sum (which Sir Robert does not specify) or a punishment of not more than a certain period of imprisonment, the Court shall have final jurisdiction. In more serious cases an appeal to the Chief Superintendent of Trade is allowed. In all cases where the death sentence is imposed, the Yamen at Peking and the appropriate Minister must first approve. Torture is not to be employed in the examination of witnesses, nor may confessions of guilt be required from the accused. Lawyers may be employed to prepare plaints, examine and cross-examine witnesses, and draw up arguments in writing for both sides. Full reports of

[9] Morse, op. cit. vol. ii, Appendix D, p. 457.
[1] *Ibid.* pp. 457-459.
[2] A defect of the existing system of extraterritoriality is that a Consular Court has no control over the plaintiff and witnesses of another nationality, who cannot be punished for perjury or contempt of Court.

cases must be sent through the Yamen to the Legation concerned, and the Judicial Rules are to be revised every fifth year.[3]

Assuming that this scheme is not accepted, Sir Robert proposes as an alternative that in all cases where both foreigners and natives are concerned a Consul and a native magistrate shall sit together as President and Assessor, the former presiding when the defendant is a foreigner, and the latter when he is a native. In suits where the property involved is above a certain value, and in prosecutions arising out of loss of life, the Assessor is given the right of appealing to Peking. Further, a resumé of cases is to be drawn up and circulated every fifth year, and rules of practice and precedents are to be prepared.[4] Failing this, Sir Robert Hart puts forward a modification of the second scheme, the chief points of which are the retention of the quinquennial preparation of lists of cases and the remission of all homicide cases, after a preliminary inquiry in the local Court, to Peking. Failing any of the above, he remarks: 'Seeing that some closer acquaintance with each other's procedure is called for, it is proposed that each shall communicate to the other an explanation of what it is the duty of his national Court to do, when a plaint is presented affecting persons or property.'[5] But above all, he insists that what is chiefly required is a common code. 'With one code and one procedure for all cases in which both foreigners and natives are concerned, and with concomitant arrangements adequate to the protection of person and property, complaints will be stopped and much that is now offensive will disappear. Room is left for growth and expansion, and for improvement of both code and procedure. Quinquennial revision provides for proper adaptation to the requirements of the time.'[6] Had Sir Robert Hart's first scheme been adopted, the later history of extraterritoriality in China might have been one of international co-operation for the reconstruction of Chinese law, and the system itself, instead of being regarded, as it is by many Chinese at the present time, as an obstacle to real legal reform in China, might have been the chief instrument towards the accomplishment of that object.

Sir Robert Hart's proposals failed to win general approval, but the problem of mixed tribunals was fully discussed at the Conference of 1879, and the proposals of the American Minister, Mr. Seward, in some points resembled those of the Inspector-General of the Imperial Customs. Mr. Seward pointed out that it was practically impossible to obtain a settlement of a claim

[3] Morse, op. cit. pp. 459-460.
[4] *Ibid.* pp. 460-461.
[5] *Ibid.* p. 461.
[6] *Ibid.* p. 471.

against a Chinese debtor by resorting to the civil Courts. The remedies in Chinese law were deficient, and the presence of foreigners, whether parties to an action, witnesses or counsel, was disallowed. As a result, where a settlement out of Court was impossible, the Consul was practically compelled to prescribe to the Chinese magistrate the appropriate judgment. Thus, a form of mixed Court had been developed by usage, but both Mr. Seward and the British Minister, Sir Thomas Wade, were of the opinion that a system of mixed Courts for the whole of China was impracticable. The difference between Chinese law and the Western system was too great. The Chinese magistrates were inexperienced in Western judicial methods, and the distances between the open ports were very great.[7] Mr. Seward therefore proposed: 'First, that the Chinese Courts be designated in which complaints of foreigners could be heard and determined; second, that the right of the foreigner to appear in these Courts in person and with witnesses be secured, and that compulsory process to compel the attendance of native witnesses be allowed; third, that the Consul of the complainant be entitled to be present in Court to assist in placing the evidence before it; fourth, that records of all the proceedings, evidence, opinions and judgments be kept.'[8] Mr. Seward's report was unanimously adopted, and a joint note sent to the Tsungli-Yamen, but the reply was disappointing. 'The Chinese authorities expressed themselves conservatively, and declined to take immediate steps for the betterment of the Chinese Courts.'[9] The Powers had done what they could to improve the position, but the Chinese Government refused to co-operate. It was obvious, therefore, that no modification of the existing system of extraterritoriality could even be contemplated until the attitude of the Chinese themselves altered.

The period from 1880 to 1911 was full of problems for those concerned with the administration of justice in the Mixed Court. One of the most important was that of the development of Chinese law, as administered by the Court, in conformity with Western standards. It was a recurring problem, and the European assessors laboured ceaselessly to abolish the more brutal incidents of Chinese punishment. Some of them, forming an inseparable part of the Chinese system, it was impossible to abolish, although they were limited, both in their severity and their application, by the European assessors as much as possible. These efforts were not always adequately appreciated

[7] Hinckley, American Consular Jurisdiction in the Orient, p. 159.
[8] *Ibid.* p. 160. [9] *Ibid.* p. 160.

at home. Thus the 'Pall Mall Budget' for July 17, 1880, observed:

'At Shanghai, where we and some other European nations and the United States have establishments, native criminals are dealt with by what is called a "Mixed Court." It is so called, no doubt, because an European or American Consul or other resident sits with the Chinese Judge; but in other respects it has little pretensions to its title, for its Court procedure and its punishments appear to be of Chinese barbarism, unmixed with the faintest trace of European sense of humanity.

'Thus, a prisoner who refuses to divulge the names of his accomplices is ordered to receive fifty blows on the face, and if these, administered apparently on the spot, fail to overcome his contumacy, another may be ordered. Beating the ankles with hammers and kneeling on chains with feet braced up are other methods of persuasion which are employed by the Mixed Tribunal, graced as it is by the countenance and sanction of an official of some great Christian Power.

'According to a tabulated report, by Mr. F. Parry, from the Supreme Court and Circular Gazette, the punishments consist in the terrible floggings, or else the "cangue" or heavy table, in which the wearer's neck is enclosed, and which prevents him from lying down or from feeding himself. That such practices should go on from year's end to year's end, with the placid acquiescence of European communities, seems hardly credible. It is to be hoped, at all events, that they will not long survive the publicity which Mr. Parry has given them. If the European Assessor has to sit on the judgment seat simply to give the countenance of civilization and Christianity to the stupid and horrible barbarities of the Chinese, to concur with a mandarin in administering blows on the mouth and hammering the ankles of prisoners who refuse to "confess" or to peach, the sooner he is removed from so shameful a post the better for himself and the civilized Power he represents.' [1]

The whole of this fulmination admirably exemplifies the need for a proper appreciation of the *dictum* of Sir Robert Hart (himself a former member of the Consular Body) that 'consuls are not naturally less reasonable or less just than other men.' [2]

[1] Cited by Kotenev, op. cit. p. 91. Report on the Mixed Court at Shanghai, 1882.

[2] It is interesting to observe how the opponents of Consular Assessors at the Mixed Court alter their line of attack to suit the circumstances. In the article just cited, the Assessors are condemned for refusing to stop 'the stupid and horrible barbarities of the Chinese.' In Professor Quigley's article (A. J. I. L. January, 1926, p. 57) appears a quotation from another article, by Gustavus Ohlinger, LL.B., Michigan, 'who was born in China and practised law in Shanghai from 1903 to 1905.' It adopts precisely the opposite attitude. 'Whether

However, the article, together with one or two questions in Parliament on the same topic, called forth a communication for Sir Thomas Wade, enclosing a dispatch from Mr. Clement Allen, the British Consul at Shanghai, completely refuting the allegation. He writes: 'I need scarcely declare that anything in the shape of torture to extort evidence, or to induce a prisoner to reveal the names of his accomplices, is utterly unknown in the Mixed Court. . . . The instrument of correction at the Mixed Court is a light piece of flat bamboo. Notwithstanding the lightness of the punishment of flogging, the British Assessors at the Mixed Court have always made it a practice only to consent to this mode of punishment when the offence has been one of brutal violence. . . .' The last mode of punishment that can be inflicted by the Mixed Court is that of the wooden collar.

from indifference, or because of a tacit understanding that their presence was not required, Chinese officials have seldom, if ever, attended the proceedings of foreign tribunals when the interests of their countrymen were involved in suits against foreigners. But foreign representatives have always asserted and exercised the right of attending the trial of cases against Chinese when the interests of their nationals were involved. This has led to one of the gravest abuses connected with foreign intercourse in China. Little by little these representatives have arrogated to themselves the right to sit in judgment on mixed cases, and by threats and intimidation, to bring the Chinese magistrate who, theoretically, has the sole decision, to the view of the controversy that they favor. Justice under such circumstances is impossible, for to the weakness and native dishonesty of the magistrate is added the aggressive partiality of the foreign representative, who, in the majority of cases, does not profess to be a judge at all, but an active advocate on the bench of the cause of his nationals.' Observations such as these are misleading in the extreme.

The paragraph, standing by itself, does not make it clear—indeed, it does not mention—that whereas the proper Court for the trial of a foreigner is a Consular Court, where the official of the plaintiff's nationality has by the Chefoo Conventions the right only of attending to watch the proceedings (this provision extends to British subjects, and, by the American treaty, to subjects of the United States only; there is no right of watching the proceedings vested in the Consuls of any other Power, although a number of others have a joint jurisdiction with the Chinese official in civil cases), yet as far as Shanghai is concerned, a special Court has been established and guaranteed by treaties to deal with cases by foreigners against Chinese, and owing to the peculiar conditions of the Settlement, special rules regarding this Court and the foreign control of it have been prepared and sanctioned by the Treaty Powers and the Chinese authorities. Mr. Ohlinger's view of the actions of foreign Assessors is not held by the International Bar at Shanghai as a whole, nor by other foreign communities in China. As an example of this, soon after my arrival in Hong Kong, a lawyer with considerable experience of Mixed Court practice observed (in connection with an intricate case in which a Chinese insurance company was attempting to avoid payment): 'In a British Court no doubt there would be an attempt to win the case on clever points, but in the Mixed Court you have to be right to win.' But no doubt the losers in both the Praetor's and the Chancellor's Courts in the early days complained of the 'aggressive partiality' of persons who 'did not profess to be judges at all.' In 1924, the American Bar Association of Shanghai drew up a series of recommendations for the future of the Mixed Court, which was sent to the United States Minister to China. In their recommendations, after observing that 'Chinese judges could not be expected to administer Western conceptions of law without guidance,' they declared that 'rendition of the Court should not exceed the handing back of Chinese civil case jurisdiction.' The American Bar Association of Shanghai could hardly have made this recommendation with propriety had Mr. Ohlinger's assertions been correct.

As inflicted by the native tribunals, this punishment often amounts to physical torture. The wooden framework of the collar often weighs as much as 75 lbs. It is kept on night and day, almost preventing the possibility of sleep, and the convict is exposed to the rays of the sun and pelting rain. Here, again, the humane efforts of my predecessors have been at work, and the punishment as inflicted by the Mixed Court is entirely moral; the framework only weighs 4 lbs. to 8 lbs., and the weight rests on the shoulders, and is only borne for six or seven hours during the day, the convict being generally allowed to return at dusk to his home to sleep, and does not leave his home until after his breakfast between nine and ten a.m. On the collar are strips of paper stating the offence. The convict is never assaulted or insulted by the mob. Sometimes he is placed outside the Mixed Court and sometimes on the spot where he committed the crime, but always under shelter from the rain and the sun. The punishment is adapted in certain cases in the peculiar mental and social conditions of the Chinese. When I was sitting as Assessor, I used to endeavour to have the punishment of the cangue reserved as much as possible for offences in which a special warning was needed—such, for instance, as pilfering of cargo by the coolies employed in the wharves.'[3] To this dispatch Sir Thomas Wade adds the following note: 'I should be sorry to be understood to be an admirer of Draconian severity, but the Mixed Court, as Mr. Clement Allen justly claims for it, is a first step towards better things and I join heartily with him in deprecating hasty condemnation of the Court. It has done great good during the fifteen years of its existence, and if, as I hope we may, my colleague and myself succeed in securing the adoption of some changes we have recommended on its behalf, its usefulness will be increased, not only as affecting Shanghai, its proper home, but as supplying a model upon which similar Courts may be formed at other ports.'[4]

The incident is of considerable importance, illustrating, as it does, the process of reforms constantly being carried out by the Assessors in face of the conservatism, and not infrequently of the direct opposition, of the Chinese magistrates—an opposition in which they were consistently supported by the magistrates of the Chinese City, whose aim (which they endeavoured to realize on more than one occasion) was ultimately to secure the abolition of the Mixed Court altogether.[5]

[3] Cited by Kotenev, op. cit. pp. 91-93.
[4] *Ibid.* p. 93.
[5] *Ibid.* p. 167.

The jurisdiction of the Mixed Court is a wide one. It extends to police cases resulting from offences committed by Chinese or subjects of non-treaty Powers within the Settlement. It also deals with the more serious crimes committed by such persons. Civilly it hears all suits brought by foreigners against Chinese in Shanghai, and also all suits between Chinese in Shanghai, when one of them resides in the Settlement. It is, therefore, obvious that the proper continuance of the Court is intimately bound up with the future welfare of the International Settlement itself, and thus it is that in times of crisis it has sometimes been necessary to provide for emergencies which the framers of the treaties guaranteeing extraterritoriality in China never contemplated. On every such occasion the authorities of the Settlement have attempted to act in the best interests of the Settlement as a whole, and not in the interests of any particular section or class. Thus the Settlement has maintained a consistent and strict neutrality during China's innumerable internal commotions; and one of the brightest features of the history of the Settlement is that, after initial misunderstandings were surmounted and in spite of the frankly obstructive attitude of some Chinese officials, all sections of the international community have worked together loyally to promote the success of unique experiment in international self-government.

A crisis of unusual magnitude arose in 1911. In that year the Consular Body found it necessary, in consequence of the outbreak of the Revolution, to frame emergency measures for the Mixed Court—measures which have encountered considerable criticism, and which have also provoked a certain amount of suspicion. A trace of this suspicion is visible in the observations of a recent American critic. He writes: 'This process of change was completed in 1911, again during a period of revolution, when the municipality assumed the power to appoint the Chinese magistrate, which it continues to usurp to this day, declining to return the Court to Chinese control until a number of conditions, amounting to the retention by the municipality of a very considerable degree of authority, are accepted.' [6] The Court, however, never has been subject exclusively to exclusive Chinese control in the sense that here seems to be implied. Although the powers of the Assessors have, unfortunately, remained vague throughout the history of the Court, it is incontestible that they have had a considerable influence on the development of the Court, and that it now administers Chinese law 'subject to the customs and to the

[6] Quigley, Extraterritoriality in China, A. J. I. L. Jan. 1926, p. 56.

procedure which have grown up in the past'[7]; and these modifications, on account of the international character of the Court, have been of considerable importance, and, as Mr. Allen and Sir Thomas Wade pointed out, have rendered a material service in the development of Chinese law on Western lines. Moreover, since the Court is within the Settlement, and since its efficiency is a matter of direct concern to the well-being of the Settlement, the municipality, as a whole, has always considered itself responsible for its proper maintenance. Mr. Playfair, a former British Assessor at the Mixed Court, wrote of it in 1893: 'It is neither purely Chinese nor purely Western. It is more Western when the foreign Assessor is able to assert himself, it is more Chinese when the Magistrate has more of his own way.'[8] Again, the Senior Consul, on behalf of the Consular Body, wrote to the Taotai in 1905: 'The Mixed Court established within the International Settlement of Shanghai in 1869 is, as its name indicates, not a purely Chinese institution, but a Court constituted by treaty in order to secure combined action in judicial proceedings. In the same way as you are representing the Chinese Government in controlling the said Court, the foreign Powers, represented by their Consuls in Shanghai, are entitled and obliged to control the actions of the Mixed Court.'[9]

The circumstances under which the municipality undertook a more direct control of the Mixed Court are, therefore, of considerable importance. The Revolution broke out in Wuchang in October, 1911, after a revolt in Western China. On November 3 Shanghai embraced the Revolution, and the Mixed Court was closed for a period. Pao Yih and Teh Kang, two of the Mixed Court magistrates, fled, taking with them the funds deposited with the Court by litigants, and leaving the Court in a state of complete confusion. Immediate measures were necessary to prevent serious losses to both the Chinese and foreign communities, and also for the maintenance of order within the Settlement. There were only two possible courses—either to leave things as they were or to extend foreign control over the Court. If the first course had been adopted, there was every possibility that one or more of the revolutionary leaders would have sought to secure control of the Court. The Consular Body met, and as a result of their decisions confirmed

[7] Barton, The Shanghai Mixed Court, 'Chinese Social and Political Science Review,' vol. v, p. 37.
[8] Kotenev, op. cit. p. 94.
[9] *Ibid.* p. 124.

Messrs. Kuan Chung, Wang Chiah-hai, and Nieh Tsung-yi in their offices as Chinese magistrates to the Court, authorized the control of the Women's Prison and the House of Detention and the Court Premises by the International Settlement Police, and requested the Municipal Council to control the financial side of the Court's activities.[1] Summing up the results of the action of the Consular Body, M. Kotenev observes: 'Practically there were only four important points which had no precedent in the past. These points were: Complete independence of the Mixed Court from the native judicial system, and thus from the City authorities; the presence of foreign Assessors watching the proceedings in purely Chinese civil suits; recognition of the possibility of foreign interests being involved in purely Chinese matters, and the appointment of a Registrar. All the remaining changes, like the procedure of filing petitions and answers, issue of summonses and warrants, counter-signature of the Senior Consul, execution of Court's orders by the Municipal Police, fees, and the right of Chinese litigants to employ foreign lawyers, had ample precedent in the Mixed Court during the past forty-seven years, and the Consular Body hardly brought any organic changes in its status and practice by promulgating the first Rules of Procedure in Chinese cases in January, 1911.[2] Rather, it compiled the numerous precedents already in use in the Court, forming the so-called unwritten code, and roughly systematizing them. But even the four above-mentioned important points were deeply rooted in the past history of the Court, and can be taken as natural and, perhaps, unavoidable results of the evolution of the Mixed Court.'[3]

As far as the independence of the Mixed Court from Chinese control is concerned, Kotenev points out that this was almost decided upon before the Consular Body took action; for the Chinese had already decided to recognize the general principle that the administrative and judicial functions should be separated (thus making it necessary that the Taotai should lose his control of the administration of justice before very long), whilst the peculiar development of the International Settlement at Shanghai, with its constant intermingling of foreigners and Chinese, made it impossible to keep their interests distinct. Moreover, the same author points out that, after the Consular Body had assumed control of the Mixed Court, and only then, had the Chinese magistrate that security of tenure of office

[1] Kotenev, op. cit. pp. 169-175.
[2] This should obviously be 'January, 1912.'
[3] Op. cit. p. 175.

(and consequently the independence) which is a characteristic of the judicial function in the West; for the Consular Body has not removed a single magistrate in a disciplinary fashion since 1911, whilst previously the Taotai frequently exercised his power of removal. 'Again, it is incorrect to speak of the control assumed by the Consular Body as a "power to appoint" the Chinese Magistrates. They were rather "accepted" by the Consular Body (as was recommended by Mr. F. W. Hadley in his letter to the Municipal Council of November 10, 1911) than "appointed," which expression was wrongly used at that time and still is used at present. The Consular Body did not assume such a right, and the most careful scrutiny cannot discover one single document in which the Consular Body referred to this privilege.' By way of illustration of the procedure adopted he adds: 'The latest appointments of Magistrates during 1924 were made upon the recommendation of the native authorities, and the aspirants were chosen from amongst those who were granted by the Chinese Government the rank of Sub-Prefect.'[4] The presence of foreign Assessors at the trial of exclusively Chinese civil suits was due to two causes—(1) the necessity for checking irregularities; and (2) the recognition of the fact that foreign interests were frequently affected by decisions in these cases, and that in Shanghai it was impossible to separate foreign from Chinese interests.

From 1911 to 1925 the Mixed Court had several important problems to face. From the purely legal point of view, one of the chief of them was probably that after 1911 there was no Court of Appeal from its decisions. Before 1911 an appeal lay to the Taotai in purely Chinese cases, and to the Taotai and the Consul concerned in cases involving foreigners. Under the Republic, however, the Taotai has been replaced by the Commissioner of Foreign Affairs; but this officer is an administrative official only, and could not assume judicial function without violating fundamental principles of the Chinese Republican Constitution. Moreover, until the political struggles and almost perpetual civil wars which have afflicted China since 1911 are settled, the traditional impartiality of the Mixed Court would be violated by permitting an official, who must necessarily belong to one of these parties, to sit on the Bench of the Mixed Court. The Consular Body have considered, from time to time, several schemes for the establishment of a Court of Appeal, but so far have not adopted any of them. The Chinese

[4] Op. cit. p. 176.

authorities outside the Settlement have also unsuccessfully attempted to establish a purely Chinese Court of Appeal.[5]

Of greater general importance, however, was the problem of the rendition of the Mixed Court to the Chinese authorities. The Chinese protested consistently against the action of the Consular Body in 1911, and the Mixed Court, as at present constituted, has been from time to time the subject of virulent attacks, both in the native Press and even by eminent Chinese politicians. At the Peace Conference in 1919 the Chinese Delegation presented a memorandum on questions which, in the opinion of the Chinese Government, required readjustment. The question of the Concessions is fully considered. A portion of this memorandum reads: 'China has been denied her right of plenary jurisdiction over her own citizens residing within the Concessions. For example, Chinese residents therein cannot be arrested by Chinese authorities except with the approval of the Consul of the State in whose favour the Concession has been granted, or, if in the International Settlement at Shanghai, of the Senior Consul; and if the particular Chinese is in some way connected with a foreign firm or family, then the consent of the Consul of the State to which such firm or family belongs must also be obtained. If in the International Settlement at Shanghai a Chinese commits a crime on another Chinese, or is sued by another Chinese, he, even though the case involves no foreigner or foreign interests, must be tried before a Mixed Court wherein a foreign Assessor not only watches the proceedings but virtually tries and decides the case. If Chinese fugitives from justice take shelter within the Concession, they cannot be reached by the Chinese authorities, except when the warrants are approved by the foreign authorities of the Concession.' Pending the final restoration of the Concessions, therefore, the Chinese proposed four modifications of the existing position:—

(1) Chinese citizens should be allowed to own land in the Concessions on equal terms with foreigners.

[5] Kotenev comments on the position in 1925 as follows: 'The institution of a Court of Appeal or any other form of an appellate system has always been a question of prime importance and necessity, and a proper Court of Appeal could hardly be substituted by any form of rehearing. But in the dense atmosphere of mutual incomprehension and distrust surrounding the problem of the Mixed Court there is no hope of reaching a satisfactory settlement of the subject. It always has been impossible for the Consular Body to discard entirely the Rules of 1869 and to act without any precedent; equally, it is hardly possible for Western jurists to resort to the old system and to agree to the appointment of a representative of the Ministry of Foreign Affairs of the Peking Government, scarcely recognized by the Chinese themselves, as a Chief Judge of a Court of Appeal. The later events of 1924 confirm this contention, when two Commissioners for Foreign Affairs acted simultaneously in the Settlement, and each of them claimed to represent the lawful Government of China!': op. cit. p. 279.

(2) Chinese citizens should have the right to vote and to sit on the Municipal Councils.

(3) Warrants and judgments delivered by Chinese Courts should be executed in the Concessions without any revision by foreigners.

(4) No foreign Assessor should be allowed to take part in the trial of purely Chinese cases.

These proposals were rejected. Probably the chief reason for their rejection, apart from the fact that the Chinese Government is not sufficiently firmly established within its own territory, is that the Chinese have always attempted to construe treaty provisions extremely narrowly, and to reject every subsequent logical development from them as illegal. Thus Kotenev, after observing that it would be a pity if the Mixed Court were absorbed into China's judicial system without leaving any trace in the history of international jurisprudence, observes: 'It is very doubtful whether the existing status of the International Mixed Court is an infringement of Chinese sovereign rights as described by the Chinese Government. There are many reasons to believe that this status is nothing more than the natural result of an unavoidable historical process which cannot be separated from the whole problem of extraterritorial jurisdiction in China. We venture also to point out that the Chinese Government has always displayed astounding ignorance in respect of everything concerning the history and practice of the International Mixed Court, though the Chinese officials had at their disposal probably more material than every foreign institution or official in China.'[6]

In 1924 the Chinese Government submitted a Note to the Diplomatic Body, requesting the return of the Mixed Court to Chinese control. The Diplomatic Body considered the Note sympathetically, but were not prepared to accede to the Chinese claim. In the same year the American Bar Association of Shanghai, in the recommendations already noted, expressed the hope that rendition would not exceed the handing back of Chinese civil jurisdiction, when the Extraterritoriality Commission provided for by the Washington Conference had reported favourably. In 1925, following the disturbances of the summer, the Shanghai British Chamber of Commerce resolved not to oppose further the rendition of the Mixed Court to the Chinese authorities. The Chinese Bar Association at Shanghai and other Chinese public bodies in the Settlement have several times expressed their desire to see the Mixed Court restored to the

[6] Op. cit. p. 276.

Chinese Government, and, during 1926, a provisional agreement for the rendition of the Mixed Court was at last drawn up, and became operative on January 1, 1927. It is to be effective for three years, with the possibility of renewal with modifications. Henceforth, the Judges of the Court are to be appointed by the Kiangsu Provisional Government. Consular Assessors sit only to watch the proceedings in criminal cases affecting the peace of the Settlement, and in other cases when a foreigner with extra-territorial rights is plaintiff or complainant. There is to be a Court of Appeal, under the presidency of the President of the Mixed Court (known in future as the Shanghai Provisional Court). The Kiangsu Provincial Government must receive a report of all cases involving imprisonment for ten years or more, or the death penalty, and it has power to order a rehearing. And there the matter stands for the present. The Mixed Court at Shanghai has had a unique and somewhat troublous history. Whether it will yet develop as the Mixed Tribunals in Egypt have developed the future alone will show. Sir Robert Hart's proposals were not hasty compilations, but the product of considerable thought and a real appreciation of the situation. On the Chinese side there has always been a deep-rooted suspicion of Consular Assessors (a suspicion which has sometimes been echoed elsewhere), and perhaps the appointment of foreign non-Consular co-Judges would do something to improve the situation, besides removing what is undoubtedly a defect from the theoretical point of view. Again, such co-Judges would be able to take a more direct part in the development of Chinese law in accordance with Western theories than the Assessors, in their undefined capacity, have been able to do. The task of re-organizing a whole legal system to meet the requirements of nearly one-quarter of the world's total population is a long one, and China will need a great deal of foreign assistance before the process is complete.

G. W. Keeton.

REVIEWS AND NOTICES.

[*Short notices do not necessarily exclude fuller review hereafter.*]

Historical Notes on the Use of the Great Seal of England. By Sir H. C. Maxwell-Lyte, K.C.B. London: H.M. Stationery Office. 1926. La. 8vo. ix and 460 pp. Frontispiece. (18*s.* net.)

A monograph on the Great Seal might seem to a lay reader likely to concern itself in the first place with the design and manufacture of the seal itself, the wax, the impression, the modes of attachment to documents, and so forth, Chaffwax being a more prominent figure than the Masters in Chancery and the Six Clerks. These things will indeed be found here, down to 'les pynnes magni sigilli,' and Chaffwax has his place, but not in the front rank. Official use of the seal and the authorities under which it is or has been used are the sometime Deputy Keeper's theme. In our days it has come to be well understood that neither the legal nor the constitutional historian can avoid grave risk of error without knowing something of the manner and form in which business was actually done. The old gibes about Dryasdust are now (to borrow a phrase of George Meredith's from a wholly different context) unseasonable for staleness and lack of holiness.

Perhaps the most readable chapter is the first, which deals with the staff of the Chancery and its history. There is a fine medieval touch about a new Chancellor's custom to take seisin of his office by sealing writs in Westminster Hall. And how many of us knew that the twenty-four Cursitors were incorporated by Queen Elizabeth, and their common seal is extant? Likewise we may sympathize with the Chancery clerks, originally in orders, in their secular struggle to be allowed to marry; for a long time special leave was required, and they were officially recognized as lay people only in the sixteenth century. At a later date the Master of the Rolls, not yet important in judicature, was deriving most of his income from the patronage of many offices in the Court, and down to the nineteenth century both he and the Chancellor were receiving the medieval allowances for diet and fees. The Chancery clerks not only engrossed charters, but drafted them for the petitioners, and now and then the originals remained unissued because the fees were not paid.

The most regular authority for affixing the Great Seal to a document is a royal warrant under the Privy Seal That seal itself, with its satellites and occasional substitutes the Secret Seal and the Signet, has

a long and curious history, with the further complications introduced from the fifteenth century onwards by the sign manual, which was admitted as a sufficient though not usual warrant. We can pick out only two anecdotes. As the Chancellor took public possession of his office by sealing writs with the Great Seal, so did Richard II divest himself of kingship by putting the signet ring on the Duke of Lancaster's finger (p. 117). In 1679 the sign manual played a part in an extreme case of the King's personal interference. Lord Danby pleaded a pardon under the Great Seal to an impeachment, but no trace of a warrant was forthcoming. It turned out that the King had sent for the Chancellor, called for the seal, written his name on the top of the parchment, and caused the seal to be affixed in his presence. The Chancellor's view was that the seal had for the moment been taken out of his custody (p. 322). For such details as the distinction between 'per ipsum regem' and 'per ipsum regem manu sua propria,' the borrowing of some great person's seal when the King had not his own signet at hand, and the names and number of the seals delivered to the Secretary of State, the learned reader must consult the book at large.

Those who are interested in medieval illuminations will find some pasture in the pages dealing with the ornamental execution of charters and letters patent, which, though not prescribed, was not infrequent down to almost our own time. One William Walding acquired such skill in illuminating or 'florishing' Queen Elizabeth's name and style that she granted him a monopoly of that work. Later specimens are common enough in municipal archives; of their degeneration let us say nothing.

F. P.

Contracts in the Local Courts of Medieval England. By Robert L. Henry. London, &c.: Longmans, Green & Co., Lim. 1926. 8vo. 1 leaf and 250 pp. (16*s*. net.)

The learned author, who has held chairs of law in several American universities, and is a Doctor of the Law Faculty of Oxford, and now in judicial office in Egypt, has made a diligent survey of the practice of inferior Courts in England in matters of contract during the Middle Ages, as it appears by the records first published or made practically accessible during the last generation. For this purpose the Selden Society's volumes have been especially useful. It was not to be expected that much new light would be thrown on the general methods of archaic procedure. On the contrary, we find set forth for the use of readers not yet familiar with the subject a good deal of information which mature students of legal history may find rather superfluous. It is better, however, to abound in elementary explanation than to run the risk of being obscure.

What we do find, in substance, is full and well ordered illustrations of the way in which medieval inferior Courts actually did their business, with not a few shrewd comments prompted by intelligent sympathy with medieval suitors. Wager of law looks at first sight like a premium on perjury, against which there was no secular sanction before the sixteenth century. Yes, but fourteenth century parties and their oath-helpers were swearing among neighbours who knew them well, and could not swear quite

recklessly if they had any reputation to lose. Judge Henry does not add anything about perjury in modern times; perhaps he could tell us something about Egypt: it could not be much worse than what Sir Mackenzie Chalmers told us in this *Review* a good while ago about Birmingham. There was a custom in some jurisdictions to select the acting oath-helpers from a larger body by the choice of the Court, or in the more curious and (as already noticed by Miss Bateson) seemingly Scandinavian way of drawing them up in two ranks, throwing down a knife between them, and taking the section towards which the point fell. With all precautions, however, it is easy to understand why the men of boroughs liked the wager of law and the foreign merchants (including English travelling traders) did not. Then Judge Henry is careful to point out that what medieval suitors wanted was not thorough discussion of the facts, weighing of evidence, and arguments in law, but a decisive judgment of some sort, and, if possible, a speedy one. Compurgation (as modern writers, even very learned ones, currently say for convenience, though it is not accurately applied to secular jurisdiction) may seem a crude form of proof to us, but at least our medieval ancestors were spared our trials extending over many days, with the attendant fees, refreshers and costs. Proof by inquest (at the parties' choice) had only a limited popularity. Judge Henry rightly impresses upon his younger readers that a medieval inquest was quite unlike our jury; it was a form of proof to which the parties committed themselves by consent, not a tribunal. The number twelve, which we find with six as, if anything, commoner, became fixed in the modern jury; a connexion with the lesser and greater usual number of oath-helpers is ingeniously suggested. There is an interesting chapter on the procedure in suing on a tally, where, unluckily, the thread is broken by intrusive paragraphs about bonds or obligatory writings which in no way resembled a tally, not even in having an indented or other counterpart. The learned author boldly speaks of a tally bond or a tally deed, but we can find neither text-book nor dictionary authority for any such term. Tally signifies on the face of it something cut, and although paper is capable of being cut in its own fashion, a tally could not be a paper or parchment. Fitzherbert, F. N. B. 122 I., is express: 'an obligation ought to be made in writing on parchment or paper, and not written upon any piece of wood, as a tally is.' Can it be that Judge Henry has never seen real tallies at the Record Office or the British Museum? or does not know that tallies are still alive in some trades? or that his notes of cases, originally loose, got mixed up and wrongly arranged? Anyhow, we are puzzled.

A good observation is that the word 'deforce,' at first used in actions of debt, but already obsolete in the thirteenth century, was probably intended to invoke the personal jurisdiction of the King or the lord of the Court, by suggesting a breach of his peace. On one little point, the form of swearing, we have reservations to make: The book was 'usually the Gospels'; surely this is excess of caution. What other book was possible, if any? unless the meaning is that one Gospel might do, with which we should incline to agree. It is said to have been usual to kiss the book: only quite late in the Middle Ages, we think. The old form of indictment for perjury said merely 'tactis . . . evangeliis.' But if Judge Henry wrote at Alexandria he was out of the way of minute research. In the main he has done a very good and profitable piece of work.

F. P.

A Digest of the Law of England, with reference to the Conflict of Laws. By the late A. V. Dicey. Fourth edition. By A. Berriedale Keith. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1927. La 8vo. cxxiv and 1056 pp. (£2 12*s.* 6*d.* net.)

This book being already a classic, and the learned editor having been chosen by the author himself to take part in preparing the last edition published in his lifetime, the present edition does not demand anything like a close critical survey. This, indeed, considering that the work is not only long but condensed, could be performed only by a reviewer familiar with every part of it by constant use; and even then the necessary limits of space would not suffer it to be adequate. Since the last edition complications have been introduced by peace treaties and statutes (including the singular constitution of the Irish Free State), for which Prof. Keith duly accounts. By the way, is it hypercritical to observe that there is now properly no such thing as a Russian Government? The Russia known to geography is under a government whose official title contains no word of its local situation or extent, and seems to disclaim by implication the old-fashioned doctrines of nationality.

Perhaps the most interesting recent judicial decision on which Prof. Keith comments is Mr. Justice Russell's in *Re Annesley*, noticed here last October. As might be expected, the learned editor welcomes the clearance of the law from the anomalous and embarrassing authority, for many years disliked but never disapproved, of Farwell J.'s too ingenious judgment in *Re Johnson*. Mr. Justice Russell's extra-judicial opinion is, also naturally enough, not approved. The reasons already given in this Review for agreeing with it shall not be repeated; all I can add is that I do not accept Prof. Keith's suggestion that the inquiry what the appropriate foreign Court would do with the very case before our Court (*including the* renvoi *question involved in it*) adds only a little more inconvenience to that which must always occur when we have to ascertain and apply the rules of a foreign law.

Prof. Pillet's criticism on Dicey's Introduction is shortly mentioned in the preface. As Prof. Keith points out, and I endeavoured to show at more length a while ago (*L. Q. R.* xl. 271), Dicey had no intention of propounding a 'théorie qui donne la solution des conflits de lois,' and therefore Prof. Pillet, as against Dicey, was merely beating the air.

F. P.

Godefroi on the Law of Trusts and Trustees. Fifth edition. By Harold Greville Hanbury, B.C.L., M.A., Fellow of Lincoln College, Oxford; of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Lim. 1927. La 8vo. cxlviii and 827 pp. (50*s.* net.)

Henry Godefroi, one of the writers on English Law who flourished during the latter part of the nineteenth century, was a University graduate, holding the degrees of B.A. and LL.B.; and he was also a barrister-at-law of Lincoln's Inn. Godefroi chose as his special subject the Law of Trusts, one of those branches of our system which are governed

exclusively by equitable principles; and in the writing of his treatise he kept a dual aim in view. As he remarked in the preface to the second edition, which was published in 1891: 'It is the object of the present edition, as it was that of its predecessor, to provide a work upon the general Law of Trusts, to which the student may resort for the principles governing that important branch of our jurisprudence, and in which the practitioner may readily find the authorities bearing upon those principles.'

The editors of the third edition, which appeared in 1907, had the advantage of personal notes and suggestions made by the author before his death in 1900; and they also followed the original plan of the work and endeavoured to adhere, so far as possible, to the author's own text. This policy has been continued by subsequent editors. Even Mr. Hanbury, the editor of the work in its latest form, faced though he was by most difficult editorial problems created by the important recent legislation of Parliament, has 'endeavoured to conserve the old material as far as possible.' Loyalty to Godefroi's original purpose and text, on the part of the editors, has been in fact one of the main characteristics of all the last editions; and yet, in the twenty-seven years since Godefroi's death, the text of the work has been subjected, owing to the growth of the law of trusts, to many changes. Some of the most important of them will be found in this fifth edition, which has been in the learned and scholarly care of Mr. Hanbury. As he remarks in the preface: 'The legislation of 1925 has made such far-reaching changes in the whole law of property that the law of trusts has undergone many profound alterations.' In order to take account of these alterations Mr. Hanbury has revised the work, and adapted it to present needs, on two main principles. Wherever possible he has inserted new matter, necessitated by recent legislation or recent cases, into the body of the text as it was left by the author and former editors; but, as he himself says, 'in some places the old and the new [law] are at such variance as to render necessary either a partial re-writing or a note explanatory of the present state of the law.' In the execution of all these features of his design Mr. Hanbury has been successful. Especially when his labour is concerned with an old and authoritative treatise on an expanding body of law that has been subjected to the recent shock of legislative reform, an editor's task requires art as well as science. Mr. Hanbury has met both of these stern requirements. He has not only woven, artistically, the new matter into the old, but he has added to the book the authority which comes from his own scientific knowledge of an intricate and extensive body of rules and principles.

As an illustration of Mr. Hanbury's partial re-writing of the text, reference may be made to the chapter on trustees under the Settled Land Acts (pp. 341—365). He has naturally made no attempt to deal with the Acts as a whole, but he has presented us with an attractive brief survey of some of their provisions, with the object of explaining the position of trustees, for the purposes of the Acts, in respect of their appointment, duties, and liabilities. Nor should it be matter for complaint that he has inserted some of the provisions of the Acts *ipsissimis verbis*. Other recent editors of works affected by the property legislation of 1922-26 have adopted the same expedient; and in the present state of the law, and of professional knowledge of the new features of the law, this course is often found to be the wisest. Not all recent editors, however,

have exercised Mr. Hanbury's restraint. In the chapter now under consideration, as well as in other parts of the work, he has not presented an almost interminable string of sections from the new Property Acts. On the contrary, he has inserted in the work relatively few statutory provisions as copied directly from the printed text of the Acts; and these few provisions he has fitted neatly into the original matter of the author and editors.

A notable example of fresh matter written by the present editor is furnished by his long note on the changes introduced into the law by the legislation of 1925 in respect of the rights of the purchaser for value without notice against the *cestuis que trust* and others (pp. 591—603). On the whole subject of the purchaser for value without notice the editor has not only carefully revised the text of the fourth edition by reference to the new legislation (see pp. 576—591), as when, for example, he draws attention to the fact that the operation of the maxim, 'Where equities are equal the legal title prevails,' has been 'very much modified by the Law of Property Act, 1925' (p. 581), but in his own note, already mentioned, he has brought clearness into the subject by enumerating the legislative changes of 1925. Moreover, in other parts of the edition Mr. Hanbury deals further with certain aspects of the matter. For example, on 'the supersession of the rule "Qui prior est tempore potior est iure," in regard to the priorities of equitable interests in land, by the rule in *Dearle* v. *Hall*' (p. 591), the reader will wish to consult other passages (p. 585, and also pp. 552—563, *passim*). By a system of cross-reference, as well as by other devices, the matter of Mr. Hanbury's note is thus brought into proper relation to other aspects of the subject with which it is concerned.

Quite naturally the provisions of the Trustee Act, 1925, occupy a prominent place in the pages of the new edition of Godefroi's work; and on the changes in the law effected by this part of the legislation of 1925 the remarks of the editor, throughout the volume, are illuminating.

Mr. Hanbury rightly draws special attention to the fact that 'trusts for sale play a very big part in the legislation of 1925' (p. 360). He reproduces the text of the Law of Property Act, 1925, ss. 23—33 (pp. 360—365); but at this point he adds very little by way of gloss (p. 360). Additional comment will be found, however, in other parts of the work, as, for example, in the chapter on sales, leases and repairs by trustees (see pp. 311—340) and in the Addenda. Among the needs of the profession to-day is a scholarly and comprehensive monograph on this topic of trusts for sale. May one venture to hope that Mr. Hanbury will fill this gap in our literature: his training and ability well qualify him for the task.

The learned editor has not dealt with statutory changes only; he has also brought recent decisions into the work. He refers, for example, to *Bowman* v. *Secular Society*, [1917] A. C. 406, and *Bourne* v. *Keane*, [1919] A. C. 815, as indicating the present policy of the law in favour of universal toleration (pp. 185—186). As he says, the latter case 'marks a great and bold breakaway by the House of Lords from old established case-law and opinion' (p. iv); for in this case 'the House of Lords, overruling all the earlier cases on the subject, laid down that a bequest of personal estate for masses for the dead is not void as a gift to superstitious uses' (p. 185). As evidence, however, that 'the Courts are not yet prepared to abandon all their old standpoints,' Mr. Hanbury cites

the case of *Re Hummeltenberg*, [1923] 1 Ch. 237. Another interesting case, decided since the appearance of the last edition of Godefroi's *Law of Trusts*, is *O'Rourke* v. *Darbishire*, [1920] A. C. 581. Mr. Hanbury remarks that this decision 'lays down that professional privilege as a ground for resisting production of documents by trustees is not displaced by the fact that the solicitor consulted is himself a trustee and is acting as professional adviser to himself and his co-trustees' (p. iv); and in a later portion of the work he refers to certain other aspects of the case (see p. 434).

In respect of legislation and case-law alike Mr. Hanbury has brought the work down to the date of its publication. In the Addenda (inserted at p. cxlviii) he refers to the main alterations and amendments of statute law introduced by the Law of Property (Amendment) Act, 1926; while he also draws attention to the very recent cases of *Christian* v. *Taylor*, [1926] A. C. 773, and *Re Leigh's Settled Estates*, [1926] Ch. 852. The latter case, which was decided before the passing of the Law of Property (Amendment) Act, 1926, is an important authority on the law in regard to trusts for sale.

In the form in which it has emerged from the revision of the present editor, Godefroi's *Law of Trusts* is to be counted among the best of the older works which deal with the new law of property. In many respects the present is a period of speculation as to the meaning and scope of the recent legislation and its relation to the old law; and no doubt the effect of many provisions of the new Acts, including some of their provisions as to trusts and trustees, will shortly be, as the editor foresees, 'the battleground of much litigation.' In the existing conditions of professional speculation on the bearing of the new Acts, Mr. Hanbury has succeeded admirably in stating his own positions cautiously and lucidly. When, after litigation has settled some of the questions now uncertain and in dispute among lawyers, a new edition of Godefroi's treatise is demanded, it is to be hoped that Mr. Hanbury will then give the profession the benefit of his further researches in a branch of English Law which easily attracts the mind of the scholar and thinker.

H. D. H.

Oppenheim's International Law. Vol. II. Disputes, War and Neutrality. Fourth edition. Edited by Arnold D. McNair, C.B.E., LL.D. London: Longmans, Green & Co., Ltd. 1926. lv and 752 pp. (42*s.*)

In *The Future of International Law*, of which an English translation appeared in 1921, the author of this work enumerated four dangers which the science of international law must avoid, if it is to be equal to its task. He pointed to the common tendency of writers to confuse their own prejudices with established rules of law; to the ease with which national bias creeps in; to the unreality of the catch phrases which pass from writer to writer; and to the prevalent ignorance of the juristic methods and literature of other countries. These are real dangers, and they are very insidious; but Oppenheim's own treatise shows, perhaps better than any other work, that it is possible to avoid them. For the qualities which above all have placed it securely in the first rank of

international legal literature are his firm grasp of the distinction between exegesis and criticism, his impartiality, his painstaking clarity of thought, and his wide knowledge of different legal systems. When to these merits of the book itself is added the excellent format, which makes it easily the most readable of the chief English treatises on the subject, the success which has called for four editions of so large and costly a book within twenty years becomes understandable.

Dr. McNair, who now takes over the work from Mr. Roxburgh, the editor of the third edition, has wisely preserved all the characteristic features of the book. In particular he has retained and enlarged the valuable bibliographies which precede most of the sections, and this in itself can have been no light task. The additional matter which he has introduced has also of necessity been considerable; the new Court of International Justice alone is responsible for twenty new pages. He has also made a small, but significant, change in the title of this, the second volume, but the first to appear in this edition, from 'War and Neutrality' to 'Disputes, War and Neutrality.' For a large part of the new matter relates to disputes which do not lead to war, and illustrates the new direction in which international legal thought is everywhere rightly turning. A new section on 'Conciliation,' 'the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and to make a report containing proposals for a settlement, but not having the binding character of an award or judgment' is a welcome innovation; it contains a history and a classification of recent 'Conciliation' treaties which is original and valuable. A recent usage, productive of much confused popular thought about international problems, has grown up of describing all amicable methods of settlement as 'arbitration,' although in fact arbitration is only one, and by no means the most hopeful, of such methods. In arbitration, and for that matter in judicial settlement too, a settlement is imposed; in 'conciliation' the parties are induced to make one themselves; and international machinery is more likely to stand the tension of a crisis if we realise that States can be led, more easily than they can be driven, into paths of reasonableness. A new term of art to describe recent attempts of this kind is a convenience.

Much of Dr. McNair's new matter, especially that relating to untried parts of the machinery of the League, raises questions to which the answers could at present only be speculative, and perhaps therefore not very profitable; none the less the reader will probably regret, though his judgment ought to approve, the attitude of caution which Dr McNair adopts. He has, however, an admirable note on 'gas warfare,' which is a refreshing corrective of the muddled sentimentality which would like to humanise the operations of war; after pointing out that there are gases *and* gases, he suggests that 'lawyers would be better employed in endeavouring, with expert scientific assistance, to eliminate the more inhumane gases than in attempts to ban all use of gas and analogous liquids in warfare.'

Two minor criticisms are perhaps worth making. On p. 102, in dealing with the Committee of Jurists which met after the Corfu incident in 1923, Dr. McNair suggests a gloss on the answer relating to measures of coercion not intended as acts of war. But the Jurists chose their words with extreme care, and it is almost certain that they intended to limit their answers strictly to the hypothetical questions put to them, and to

exclude any reference to the actual circumstances which had notoriously provided the occasion of the questions, but were not mentioned in them. On p. 474 the passage relating to the special status of Switzerland in the League gives December, instead of January, 1921, as the date of the request to Switzerland for passage of an international police force over Swiss territory, and does not mention that the refusal was withdrawn when the non-hostile mission of the force had been explained to the Swiss Government. J. L. B.

The Acquisition and Government of Backward Territory in International Law. By M. F. Lindley, LL.D., B.Sc. (Lond.). London: Longmans, Green & Co. xx and 391 pp. (21*s.* net.)

It often happens in the development of a branch of learning that a moment arrives when certain scattered aspects of it seem to demand treatment as an organic whole, and to benefit by such treatment. Dr. Lindley has seized that moment in this book. His theme is the acquisition and government of territory; and, inasmuch as the territory which is now changing hands, or is likely in the future to come for the first time into the ownership of any State, is mainly territory which is uninhabited or inhabited either sparsely or by peoples not possessing what Europeans and Americans complacently term 'civilization,' he has appropriated to it the expression 'Backward Territory'—a convenient and justifiable omnibus description.

In Part I he deals with "The Territory,' land and sea, including the Arctic and Antarctic Regions, gulfs and bays, the sea-bed, and the maritime belt, and discusses how far sovereignty can be attributed to backward peoples. Relevant conventions, such as the General Act of the Berlin Conference of 1884—1885, and understandings such as the Monroe Doctrine are examined. He then turns (Part II) to the nature of 'The Acquiring Sovereign' and the agencies of acquisition, individuals and corporations (such as the British East India Company and the British South Africa Company), and distinguishes the creation of new States—Liberia and the Congo—by the efforts of non-national associations.

Part III deals with 'The Methods of Acquisition,' Papal grants, discovery, effective occupation, conquest, cession, prescription, protectorates, leases, mandates, &c. Perhaps the true international lease (*e.g.* of land at Kismayu, by Great Britain to Italy, on January 13, 1905) might have been mentioned by way of contrast to the leases, *e.g.* of portions of China, where 'the internal sovereignty passes under the lease,' and which are in fact cases of camouflaged cession. In Part IV he examines the nature of the sovereignty exercised by a State over backward territory acquired by it, and its rights and duties, both as regards the inhabitants and as regards other States. This part explores a number of unfamiliar topics, such as Native Title to Land, Slavery, the Liquor Trade, Native Religions and Customs, and will be useful both to international lawyers and to colonial administrators.

The work consists mainly of a patient examination and correlation of views already expressed, and its claim to 'novelty,' as patent lawyers would

say, lies in arrangement and collection rather than in originality of opinions. The chapters on Protectorates and Spheres of Influence and Interest contain useful analysis and classification of materials which present great heterogeneity, and are notoriously difficult to reduce to order.

This work represents the fruits of very extensive reading and investigation, and Dr. Lindley is to be congratulated on having produced a well-documented volume which, particularly with regard to the more backward of the territory discussed by him, forms a source of information of great utility. It comes opportunely at a time when, under the stimulus, both direct and indirect, of the Mandates Commission, there is a tendency amongst 'civilized' nations to take their obligations towards backward peoples rather more seriously.

A. D. McN.

Encyclopedia of the Laws of Scotland. Under the general editorship of John L. Wark, K.C., LL.D. Vol. I: Absolute Disposition to Arrestment. Edinburgh: Wm. Green & Son, Lim. 1926. La. 8vo. civ and 566 pp. (£2 17*s.* 6*d.* per vol.)

This Encyclopedia is virtually the third edition of Green's 'Encyclopedia of the Laws of Scotland,' which was first published in 1896. A second revised and augmented edition appeared in 1909.

The present work is edited by Mr. John L. Wark, K.C., LL.D., assisted by Mr. A. C. Black, K.C., while Lord Dunedin is consultative editor.

In an interesting preface Lord Dunedin points out that such a work was intended to assist the legal practitioner in Scotland, and especially the country practitioner who had not the opportunity to consult an extensive law library. In fact, practitioners in Scotland have found it a short cut to sources and authorities of law on almost every subject.

In certain respects the present edition differs from its predecessors. The articles are not merely divided into sections and sub-sections, but the whole volume is paragraphed from start to finish. Such an Encyclopedia can never be quoted as an authority, and therefore it is difficult to understand why the system of Bell's Principles, which incidentally were not based on an alphabetical classification, has been adopted. The authorities are also now cited in footnotes instead of brackets, a matter on which individual tastes will differ. The system of cross-titles—in which the influence of the 'Faculty of Advocates Digest' may possibly be discerned—has been greatly improved and is thoroughly exhaustive.

The value of the index to the volume, which has been carefully compiled, may be doubted. In the case of an alphabetical encyclopedia, where the contents of each article are adequately summarised and sub-divided, an index to each volume at least seems hardly necessary.

The present work, which, as has been pointed out, is the successor of 'Green's Encyclopedia,' does not give, as the second edition of that work did, the names of the original authors, and therefore it must be regarded as a new production. This may be regretted by some, as many of the original articles were by well-known authorities on the various subjects, whose names carried the weight of the authority of years.

This criticism, however, must not in any way be regarded as a disparagement of the present work, which deserves high praise, and surveys satisfactorily the law of Scotland on the various subjects treated.

As regards particular articles in the volume, that upon Agency might be referred to. At first sight one would be inclined to regret that this subject has not been dealt with by Professor W. M. Gloag, K.C., the author of the 'Law of Contract in Scotland,' a frequently quoted volume, as his chapter on agency in that volume is particularly good; but the present article, which is the work of Mr. A. C. Black, K.C., and Mr. McKechnie, is a good one. There is apposite and copious citation of authority, both Scotch and English. Generally speaking the law in both countries is the same on this subject, but where the law differs this has been alluded to. This is helpful, not only to practitioners in Scotland but, if the Encyclopedia is to be referred to as a work of reference by lawyers in England, it is certainly advisable that in the case of mercantile law subjects, where the law of two countries is generally speaking the same, any differences should be made clear. The only criticism that one might perhaps make on this particular article on agency is that the effect of the cases of the *Universal Steam Navigation Company* v. *McKelvie & Co.* [1923] A. C. 497, and *Stone & Rolfe* v. *Kimber Coal Co., Lim.* [1926] S. C. (H. L.) 45, and [1926] A. C. 414, on the question of an agent's liability for a disclosed principal, in particular with reference to his form of signature and to what is said in the body of a document or contract, is not sufficiently stressed.

If the Royal Commission on Court of Session Reform leads to many changes in procedure it may be unfortunate that the articles such as Actions, Admiralty, Appeals and, possibly, Arrestment all come under "A." It is a fairly certain prophecy that Admiralty procedure will be materially altered in certain respects, while there are likely to be changes to some extent as regards the forms of other actions and rights to appeal. Possibly, too, the method of procedure under which letters of arrestment to found jurisdiction are obtained may be altered.

Another point which was discussed before the Commission is the question of whether stated cases on law in ordinary arbitrations should be introduced in Scotland. The article on Arbitration also comes within this volume. Of course no book of reference can ever remain absolutely up to date, but, if there are to be radical changes in any of these matters, it is to be hoped that the final volume of the Encyclopedia may have included in it as an appendix some reference to such changes.

From the fact that under the cross-title of Affreightment the reference is to Carriage by Sea, it can be inferred, as is known to be the case, that in the whole Encyclopedia the subjects relative to carriage by sea, *i.e.* Bills of Lading, Charterparties, &c., are to be grouped together instead of being dealt with one by one as they were in 'Green's Encyclopedia.' This change is clearly for the better.

In the article on Admiralty Procedure, Mr. McMillan, the writer, after an interesting historical survey, says 'the general features which distinguish Admiralty procedure are that it is summary and expeditious, and that it provides special facilities for proceeding *in rem* against a ship or her cargo.' In Scotland at the present moment, whatever may be the position, if there is reform of the Court of Session, expedition can hardly be said to distinguish Admiralty procedure, at any rate as compared with England. Practically speaking, Admiralty matters at present are dealt with on the same lines and with the same expedition as other actions, and

one of the chief points that were urged before the Commission was that this should be put right.

As regards special facilities for proceeding *in rem* in Scotland this procedure has very rarely been adopted, and indeed it is rarely necessary to adopt such procedure, as similar results have nearly always been obtained by arrestment to found jurisdiction by which the wrong-doing ship, or the ship upon which there is a lien, is arrested, and by arrestment on the dependence by which security is obtained. It is only in very special cases that there is any advantage in Scotland in procedure *in rem, e.g.* where there has been a demise. It is also to be noted in Scotland that in respect of a collision, salvage, &c., jurisdiction can be obtained not only by the arrest of the wrong-doing vessel, but by the arrest of any other vessel belonging to the same owners. Mr. McMillan's article points out that actions *in rem* are rarely used in Scotland, but perhaps he does not sufficiently set out really the differences between Scottish and English practice as at present existing. It is noticeable that he does not in his article quote the case of *Currie* v. *McKnight*, 4 R. H. L. 1, in which it was laid down by the House of Lords that the maritime law of Scotland is the same as that of England. It may be said that, strictly speaking, this question does not fall under the heading of Admiralty, but as his article is concerned with such questions as maritime liens, &c., and as *Currie* v. *McKnight* is the great authority which has laid down definitely the principle stated above, one does feel that it is one of the very few omissions of authority in the volume.

In the article on Arrestment, which is written by Mr. A. S. D. Thomson, late Sheriff-Substitute of Lanarkshire in Glasgow, a branch of Scottish law which is entirely foreign to English law is fully dealt with. The article includes arrestment to found jurisdiction, under which jurisdiction can be founded against any foreigner by the arrestment of any property of his which is in Scotland in the hands of the person who has such property, or by the arrestment of a ship of his in Scottish waters, or by the arrestment of any debts due to him. This basis of jurisdiction, which has often been resented by foreigners to Scotland, including Englishmen, is, as was said in the case of *Cameron* v. *Chapman*, quoted in the article, plainly in opposition to the general doctrine in Roman Law and modern jurisprudence, both of which admit the maxim, '*actor sequitur forum rei*,' and was borrowed by Scotland from Holland. The article also deals with arrestment on the dependence, by which security is obtained by the pursuer or plaintiff for his claim by the arrest of property or money belonging to the defender. The pursuer by this means, if when he begins his action he can obtain such security, will be able to make good his claim at the end, even although the defender may have become a bankrupt by the time judgment is obtained, as the security is operative as from the date of the arrestment, always provided the bankruptcy does not take place within sixty days of the arrestment. This form of arrestment is really analogous to the arrest of a ship in England in an action *in rem* as security, and it is a form of security which it is believed has been suggested should be introduced into England.

It is not possible in the scope of this review to deal with any other articles in detail, but the whole work has been well done, and is a credit to the editors, the authors and the publishers.

H. B. S.

Prideaux's Forms and Precedents in Conveyancing. Twenty-second edition. By Sir B. L. Cherry and J. R. P. Maxwell. Three vols. Volume III. London: Stevens & Sons, Lim.; Solicitors' Law Stationery Society, Lim. 1926. La. 8vo. cxlviii and 1390 pp. (£6 6*s.* net the three vols.)

The third volume of Prideaux is very welcome, and completes this edition of these well-known and much-used precedents.

This volume begins with a very convenient summary of the Law of Property (Amendment) Act, 1926, and the cases decided up to date on the new Acts, and then gives in three chapters, comprising 100 odd pages, an introductory statement of the new law of trustees, the law of husband and wife as regards the wife's property and contracts, and the law and practice relating to settlements. Then follow precedents, fully annotated, of personalty settlements, realty settlements and disentailing assurances, appointments and discharges, &c., of trustees, separation deeds, wills, assents and administration instruments, documents relating to charities, and leases and instruments relating thereto—the whole volume comprising 1220 pages, exclusive of some of the introductory pages and the index.

This third volume is perhaps the most interesting of the three volumes to a lawyer who specialises in conveyancing, as it deals with settled land. Resettlements in particular have provided a stumbling block, because it is difficult to see what form of vesting deed (if any) should be used. We are interested to see that in the note on p. 320, and the form of resettlement on p. 321, it is suggested that no vesting deed is necessary in the ordinary case where a principal vesting deed has already been made and the existing estate owner is to retain the first life interest. In this case the resettlement deals merely with the equitable interest. We think this is the correct view; it is, at any rate, a simple way out of a difficulty. Under the former law (at least while *Re Cope and Wadland* and *Re Constable* were authorities) there would, after the execution of a resettlement, have been three settlements—the original settlement, the resettlement, and the compound settlement. *Prima facie*, each settlement under the new law should have its own vesting deed. Provisions relating to compound settlements appear all through the Settled Land Act, 1925, and section 1, sub-section 1, contains a proviso that where land is the subject of a compound settlement, references in the Act to the settlement shall be construed as meaning such compound settlement. If the resettlement is tacked on, so to speak, to the principal vesting deed, it has the effect of first, leaving the resettlement without a vesting deed to support it, and, secondly, of making the principal vesting deed a vesting deed in reference to a settlement different from that in respect of which it was originally drawn, *i.e.* in reference to a compound settlement instead of a simple settlement. The first of these difficulties may not be of much weight since *Parr* v. *Attorney-General* [1926] A. C. 239 (apparently given statutory effect to in section 22 of the Settled Land Act, 1925) has disapproved of *Re Constable*. The second of these difficulties seems to have presented itself to the learned authors. On p. 390 there appears a precedent of a supplemental vesting deed to be used where the resettlement confers additional powers. A footnote refers to this form as a 'luxury,' and suggests that by setting out the new additional powers it facilitates the making of title and general estate management. The form, however, would be easily

adaptable to a vesting deed made in reference to the compound settlement composed of the original settlement and the resettlement. We think it probable that some conveyancers will utilise it for that purpose, and will not favour the telescoping together of the settlement and resettlement, which the use of a single vesting deed indicates.

We are pleased to see practical precedents of the rather elusive special overreaching trust for sale (at p. 463), and the special overreaching settlement (p. 512).

We have hinted in reviews of former volumes of Prideaux that perhaps the straightforward lawyer (we apologise if we are using a wrong expression) may find that *Prideaux's Precedents* err rather too much on the side of subtlety. There are in this volume two specimens of very ingenious drafting, one of which we think very successful, the other of which we are more dubious about. On p. 563 there appears a precedent of a deed of appropriation by personal representatives which skillfully utilises section 41 of the Administration of Estates Act, 1925, for the purpose of getting rid of an annuity and a reversionary family charge affecting settled land vested in an absolute owner. The note frankly explains that an alternative method of dealing with the situation would be the execution of a vesting deed or assent by the personal representatives. On pp. 479, 482 and 483 appear forms for the appointment by the direction of members of a syndicate of additional trustees of land vested in a sole trustee on a secret trust, where it is not desired to disclose the membership of the syndicate. By a series of ingenious cross-references the names of the syndicate are kept off the title, but the upshot of it is that a purchaser would be faced with the unusual transaction of a person apparently a beneficial owner conveying *as trustee* to two persons upon trust for sale.

We have enjoyed looking through this volume of Prideaux, and we are of opinion that these three volumes and the colossal work they represent constitute a most outstanding contribution to the practical elucidation of the new law.

R. R. F.

Key & Elphinstone's Compendium of Precedents in Conveyancing. Twelfth edition. By Frederick Trentham Maw, B.A., LL.B., and Howard Wade Renshaw, B.A., LL.B. Assisted by Wilfrid Gutch, M.A., Barrister-at-Law. London: Sweet & Maxwell, Lim. 1926. La. 8vo. Vol. I, Part II. pp. cliii and 731—1302. (Complete work, £5 15*s.* 6*d.*)

This Part contains the Index and Tables of Cases and Statutes for Vol. I, and Precedents under the following heads, namely: Direction and Consent, Disentailing Assurances, Exchanges, Indemnity, Leases, Licences and Water Rights, and Miscellaneous Precedents. It has also an Addenda and Corrigenda for Vol. I, incorporating the changes made by the Law of Property Amendment Act, 1926, and references to decisions reported to date. It is to be regretted that the learned editors have contented themselves merely with giving references to the Law of Property Amendment Act instead of stating the substance of the amendment as well. It is difficult to decide upon what principle the cases incorporated

have been selected. *Gregg* v. *Richards* (p. 498) is referred to as is *Re Stollery* (p. 720), there misspelt *Re Stallery*, but *Re Cassel* [1926] Ch. 358, distinguishing *Kennedy* v. *Kennedy* (referred to on p. 85) and *Re May* [1926] Ch. 136, applying *dicta* in *Re Joicey* and distinguishing *Re Greenslade* (both referred to on p. 86), for example, are not. Furthermore, *Re Frewen* [1926] Ch. 580 is at least in point on p. 1010, note (*b*), as also is *Re Craven's S. E.* [1926] Ch. 985, which should also be incorporated on p. 586. *Re Cowley's S. E.* [1926] Ch. 725, might assist in interpreting what is a settlement (p. 581) and also S. L. Act, s. 22 (p. 584), where should also be included for this purpose *Re Cradock's S. E.* [1926] Ch. 944, which is only given with reference to p. 1079. The references in the Addenda and Corrigenda are not themselves always accurate: *Re Llanover* is spelt *Re Llandover*, *Parr* v. *Att.-Gen.* is referred to on p. 584 and not p. 585. These discrepancies are not pointed out in any spirit of carping criticism, for no work of this character could escape blemishes, but rather as a plea that Part IV when it appears may have an Addenda and Corrigenda covering both volumes that may be fully worthy of their general excellence. In this respect it may be added that some similar slips in this part have been uncorrected. An amusing example is the fate of *Edell* v. *Dulieu* which is misspelt *Edell* v. *Dulien* on pp. 824 and 825 and correctly on p. 943, but again inaccurately in the Index where the only reference is to p. 943. For the precedents themselves and the notes thereto it is little likely that in the ordinary course of practice the practitioner will not find his wants supplied. In this respect, however, a protest might be entered in respect of the frequent reference to the 7th edition of Elphinstone's Introduction. This edition, which, excellent as it is, cannot be described as a work of authority, will very shortly be rendered obsolete by the appearance of a new edition as well as by the existence of the new law. Quite naturally, those to whom this work will be most useful, the student and the young practitioner, will have by them a copy of the new edition, so that this system of reference will be troublesome to say the least, unless, in the new edition thereof, some method is utilized to enable the reader to follow the older pagination.

Perhaps the most interesting set of precedents are those contained under the head of Miscellaneous. They are all (31) the result of the new legislation and are miscellaneous indeed. The note to the first should, it is thought, at least contain a reference to the Law of Property Amendment Act, 1926, making sale subject to an annuity possible in some cases without resort to settlement or trust for sale. The note on pp. 1070 and 1071 seems to be ambiguous in reference to an indorsement of an assent on the probate. A. E. Act, s. 36, speaks of notice of such an assent being endorsed, not the instrument itself, and it would seem that this would be the better course (a) because there is a document of title to go with the deeds; and (b) if a certificate of endorsement of notice on the probate were noted on the assent by the person making the endorsement this might, at a later date, conceivably facilitate the investigation of title, though it has no statutory sanction. The fact that vesting instruments, including subsidiary vesting deeds, are scattered in various parts of the work may be logical, but it is suggested that convenience would be consulted had vesting assents and vesting deeds to give effect to settlements subsisting prior to 1926 been incorporated under the head of Settlements in Part II of Vol. II, though it may be the late appearance of that Part may have rendered it desirable to insert them in Parts earlier issued. Note (*d*)

to Precedent XXVII omits to say that a sub-term is capable of enlargement only if the head term is so capable: old law under the Conveyancing Act, 1882 (now L. P. Act, s. 146, sub-s. 8). Like unto this omission is the failure to make any reference to the Common Law Procedure Act, 1852, in the note on relief from forfeiture under a covenant in a lease, though rent is mentioned on p. 818. Perhaps more explicable though not less strange is the absence of any observation at the bottom of p. 833 that a mortgagee may by writing delegate his power of leasing to a receiver when appointed (L. P. Act, s. 99, sub-s. 19), though it is substantially referred to without authority given on p. 1012.

The manner in which some of the dissertations and notes supplement one another on the general principles of a subject such as powers of a mortgagee or tenant for life to lease occasionally results in overlapping, and is sometimes apt to confusion or redundancy. For example, the period of a mining lease under S. L. Act is stated on pp. 1006 and 1008, which surely is unnecessary. Another example is the law of leases by a mortgagee given on pp. 833 and 1012, though not altogether the same material in each case; furthermore, there is no cross-reference on p. 1013 to p. 833. It is suggested that the general subject-matter should be exhausted in the dissertation and only any special point arising on individual precedents be given in a note to it.

These matters, however, are slight flaws in a work of the proportions of that under discussion, and are inserted only by way of suggestion and not adverse comment. They also show, it is hoped, the care which has been exercised before commending, as is wholeheartedly done, the work to the practitioner as fully maintaining its acknowledged standard.

The Index and Tables of Cases and Statutes have been tested, and in the main proved satisfactory, a thing hard to come by in this matter. It is, however, suggested that the headings should, where possible, state the law and not its converse. For example, "Joint tenants, legal estate in fee simple cannot be limited to," is not calculated to inspire confidence in the text where, of course, the matter is accurately stated. However, the principal function of an Index is to give references—and accurate references—to the subject-matter of the text, and disappointment here has been rare.

H. P.

Bythewood and Jarman's Compendium of Precedents in Conveyancing. Second edition. By Stuart L. Bathurst and Donald C. L. Cree, assisted by Norman H. Oldham, W. S. Norwood, K.C., A. S. Oppé, A. R. Taylour and K. R. A. Hart, Barristers-at-Law. Vol. I, Part 2, xix to lxiv and pp. 501 to 821. Vol. II, Part 2, xii to lxiv and pp. 289 to 773. (Price, two vols. in four parts, £4 10*s*. net.)

With the appearance of the final parts of each of these two volumes this new edition of Bythewood and Jarman stands out as one of the few compilations of conveyancing precedents which appeared in a complete form within six months following the date of the coming into operation of the new conveyancing statutes. In these volumes the editors have made a very

successful effort to meet the requirements of a large body of practitioners in both branches of the profession who are anxious to have paths marked out in every direction as a guide to their routine work, even though the more subtle difficulties and questions may not be cleared away or answered at once. This work offers a number of simple and typical forms under each head, and the old precedents appear to have been very carefully considered in the light of the new laws. Vol. I, part 2, begins with 'Declarations,' and includes, among other titles, 'Disentailing Deeds,' 'Exchanges' and 'Leases.'

In regard to disentailing deeds, the 9th Schedule of the Law of Property (Amendment) Act, 1924, declares that the Fines and Recoveries Act, 1833, is to remain in force in regard to dealings with entailed interests as equitable interests; this does not, apparently, mean more than that entailed interests are to be included among the equitable interests which are provided for by the Act of 1833. And it may therefore be doubted whether the form of grant used by the editors (see forms, Vol. I, pp. 513 *et seq.*), *i.e.* a grant limited to an equitable estate in fee simple, is a disposition which is or purports to be adapted to pass the legal inheritance within the meaning of the Fines and Recoveries Act, 1833, section 40, according to the construction given in *Hayes, Introduction, &c.*, 5th edition, Vol. I, p. 154, and approved recently in *Re Meeking* [1922] 2 Ch. 523, at p. 538. It is submitted that the form of grant required by the Act of 1833 is and was always metaphorical in relation to equitable estates tail, and that since the power to bar the entail is an incident of an estate tail (see *Lord Lilford* v. *Att.-Gen.*, L. R. 2 H. L. 63), the exercise of such a power could in any event now only operate in equity (cf. L. P. Act, 1925, s. 1 (7)). The view that disentailing deeds should purport to pass the legal estate finds support in *Davidson's Concise Precedents*, 21st edition, p. 226. The same view is stated, in a modified form, in *Key and Elphinstone*, 12th edition, Vol. I, at p. 739; but the learned editors are apparently undecided as to the form and interpretation of the words of the grant.

Among many useful forms under 'Leases' mention may be made of a precedent in Vol. I, at p. 675, for an agreement by an incumbent to let the parsonage house in connection with the Pluralities Act, 1838, s. 59. At page 712 of the same volume there is a form of delegation of trust by a trustee intending to remain abroad for more than a month, under the power conferred by section 25 of the Trustee Act, 1925. The precedent would be more useful if, in extension of sub-section 10 of section 25, *ibid.*, it provided a direct authority to act and deal in the principal's name in connection with bank accounts in the names of the trustees without reference to any trust. As a rule banks would object to a power of attorney which necessitates the identification of the property intended to be dealt with with property comprised in the trust, and they would not look with favour upon a mandate which introduces the provisions of a trust deed into the four corners of the power of attorney. At the same time this precedent is a good illustration of the value of an ascertained model in drafting a new form of document.

The final part of Vol. II treats of settlements, real and personal, and wills. In the law applicable to these subjects revolutionary changes have been introduced by the Administration of Estates Act, 1925. This Act swept away the doctrine of primogeniture and Common Law and statutory rules of descent of real estate; it stripped property of one of its chief attributes by

depriving the owner's family outside his immediate descendants and a very restricted circle of ascendants and collaterals, from rights of intestate succession to his property, and it substituted the Exchequer for the numerous classes of heirs or next-of-kin who have been excluded. Although the law has changed it is probable that the majority of owners are anxious to keep the property in the family in case of intestacy or other failure of disposition, especially where the family fortunes have been handed down from a common ancestor; and this was implied until 1926, and was the basis and understanding of the forms in use both in settlements and wills, but now that the substratum has shifted very considerably it may become necessary to revise every and any form of disposition, even the simplest, if effect is to be given to the intentions (if any) of the grantor or testator in this respect. In framing wills, settlements and other family dispositions, care should be taken to bear in mind the present conditions before accepting and following forms and clauses which had the intended effect only because they relied on legal consequences which did not require statement. Now, the former implications require the clearest and most definite expression in every case. The matter is referred to, and precedents are submitted, in Vol. II, p. 341, note (q) and p. 415, note (o). But an indication of the conservative habits of conveyancers may be gathered from the complete absence of any reference to this question under the heading of 'Wills.' On the vexed question of re-settlements of land the editors take the view in Vol. II, p. 439, note (q), that so long as the trustees of the original settlement are undischarged, any additional or larger powers which may be conferred upon a re-settlement would not be effective, since they would not be mentioned in the principal vesting deed, and the Act does not contain any provision for a supplemental or additional vesting deed for the purpose (see Settled Land Act, 1925, s. 18 (1)). It is not clear that a second principal vesting deed is not available under the provisions of the Act, either because no change is to take place in the ownership of the legal estate or because a first principal vesting deed is already in existence (see section 4, sub-section 2, and section 5, sub-section 2, *ibid.*); even though section 9 (iv) declares that a settlement does not become a trust instrument unless and until the interest settled takes effect free from all interests and powers under any prior settlement. Section 22, sub-section 2, definitely enables a tenant for life upon restoration of his life estate, in addition to his former powers, to exercise such further powers as are conferred by the re-settlement as if he had been entitled under the re-settlement only and his estate under the prior interest had not been restored. It is submitted that these words in section 22 are sufficient to permit the working of the machinery of the Act in furtherance of the rights which it confers, and that a second principal vesting deed, if necessary, may and should be executed to give effect to any additional powers in the re-settlement.

Mention may be made of two minor discrepancies. In Vol. I, p. 709, the reference in note (y) should be to the Patents and Designs Acts, 1907 to 1919, and the Patent Rules, 1920, and note (g) at p. 427 of Vol. II should have referred to section 22 of the Settled Land Act, 1925. The general body of the work has been prepared with great care. The numerous precedents and notes have been brought up to date, many new forms have been included without undue compression or exclusion in these two volumes, and the editors may be congratulated on the completion of a general survey of the whole field of conveyancing which will be useful and valuable to conveyancers in both branches of the profession.

Welsh Tribal Law and Custom in the Middle Ages. By T. P. Ellis, M.A., F.R.Hist.S. Oxford: Clarendon Press. 1926. 8vo. Two vols. xiv and 456 pp., 456 pp. and maps. (£4 net.)

As a good Welshman Mr. Ellis has considerable admiration for the ancient laws of Wales, at any rate in comparison with those of other nations of medieval and earlier periods; and in these volumes, while setting forth the Code of Hywel Dda and other sources in detail, he frequently finds space for cognate provisions in Roman, Irish, Anglo-Saxon and other systems, by way of information, and often, incidentally, by way of shewing the superiority of the laws of his own fathers. This is not to say, however, that there is anything forced or partisan in Mr. Ellis's painstaking pages; such a suggestion would give an entirely false impression of a scholarly work which deals with a time too remote for partisanship. One would rather, with the author, direct attention to what does seem to be an undoubted fact—that the old laws of Wales shew, as Mr. Ellis claims, that 'the system is an advanced one in many particulars, and that the old Welsh lawyers were possessed of a highly skilled legal acumen.' But the laws reveal much more than legal acumen on the part of practitioners and legislators. They reveal, for instance, what other ancient systems—even the Roman—produced with such laborious slowness—the right of individuals to contract outside the law. They shew, again, regard for a man's freedom and dignity, apart from his possessions, in the fact that Welsh laws are ignorant of status by land, did not recognize a 'noble' class, apart from the freemen, and having higher or more exclusive privileges than they enjoyed, and made no provision for primogeniture. And 'freedom' was not in Wales, as it was in some other countries, a synonym for the privileges of the aristocratic few—a term of irony as a description of society in general. Mr. Ellis declares it was 'the status of considerably more than half of the Welsh people.' And Welsh freedom was, on the whole, a real thing, as well as a status. As Mr. Ellis says, 'The right to move whithersoever he willed was the keynote of Welsh freedom. The generality of Englishmen were bound to the soil; the servile tenure was the rock-bed of feudalism, and it was the desire to avoid the same system being thrust upon them which induced the Welsh to maintain their struggle for freedom for so many centuries' (i, p. 175). Again, there is the high position of freedom which women enjoyed in early and medieval Wales, perhaps the most remarkable of all the features of Welsh law. An unmarried girl of twelve—the legal age of puberty—became her own mistress. As Mr. Ellis points out, 'she could elect to remain at her father's platter or not.' She could hold property of her own, 'and had full power to go wherever she willed. There was no trace of anything like the "patria potestas" of the Roman law in regard to her' (i, p. 386). The Law of Gwynedd says expressly, 'every woman is to go the way she wills, freely.' Allied to this freedom of women were the provisions for divorce, unknown elsewhere in Western Christendom. Wales had even reached the extremely 'advanced' position of permitting divorce by mutual consent.

But it was the comparative mildness and humanity of the criminal law which perhaps most of all distinguished the Welsh Code. There was punishment for breach of the laws, and punishment which did not affect

to be anything else: reformation by punishment was not among the advanced conceptions of old Welsh law. But most of the barbarities of other early Codes were absent. Reparation for wrongs inflicted was the basis of punishment: the fine was the common sentence; even of imprisonment Mr. Ellis can find hardly any trace, imprisonment for a term being nowhere mentioned in the laws; the death penalty (inflicted in Anglo-Saxon law on children for theft) was not a common feature of the Welsh law, and the system of mutilation, common in English law, was absent. Apart from reparation fines, the characteristic punishments in Welsh law were exile and food-forbiddance, the latter being an edict forbidding any one to give food or shelter to the accused person. It appears to have been a temporary expedient, to force the alleged offender to submit himself to the law.

Mr. Ellis's book does not attempt to unveil the very early state of Welsh law, and, as he himself notes in one passage, there must have been considerable differences in the law and customs of the people at the beginning of the fifth century and five and a half centuries later, when Hywel Dda codified the law as it had then developed. It is this developed stage of Welsh law and custom—as it existed between approximately 900 A.D. and 1300 A.D.—which Mr. Ellis spreads before us in these volumes; and for the laws in that stage he claims that they 'contain perhaps the most complete picture of that law which the Latin jurists spoke of as the "Ius Gentium."' In this aspect alone lies sufficient justification for Mr. Ellis's labours. E. E. W.

Administrative Procedure in connexion with Statutory Rules and Orders in Great Britain. By Professor J. A. Fairlie. University of Illinois. 1925. 84 pp. ($1.00.)

As his 'British War Administration' showed, Dr. J. A. Fairlie, Professor of Political Science in the University of Illinois, is a shrewd and sympathetic observer of our methods of government. His account of our Statutory Rule and Order system is workmanlike and well-informed. He traces in our statute-book the occasions of departmental legislation from early times to the year 1890, and the remarkable development thereafter. He analyses the agencies to which the law-making power is delegated, describes the extent of judicial control, and notes the tendency (since 1919) to require the positive Parliamentary confirmation of important Orders in Council and regulations. His thoroughness may be judged by his full list of Advisory Councils and Consultative Committees (bodies which save departmental legislation from the reproach of not considering the interests affected), and in his first-hand account of a Board of Trade inquiry on an application for a special order under the Gas Regulation Act. The general exactitude of Dr. Fairlie's statements, for which he can often vouch the authority of a personal interview with departmental officials, is seldom at fault. He seems in error, however, in writing on p. 55 that official reports of Privy Council meetings no longer state what Councillors were in attendance. Some of his remarks on that anomalous form of law-making known as Church Assembly Measures could to-day be modified, for the text of the Measures is now printed in the annual volume

of Public General Acts, and the rules and orders made under Measures are published in the same form as if made directly under the authority of Acts. He speaks of these Measures as a form of delegated legislation to which Parliament gives a specially careful consideration. Parliament, indeed, has created a special machinery for them, but the object of the enabling Act was to relieve Parliament of the labour and odium of considering ecclesiastical matters, and a Measure now suffices where a fully discussed Bill was formerly required. It is, perhaps, not fair to blame Dr. Fairlie for typographical mistakes. The names of Lord Cozens-Hardy, Mr. Alexander Pulling, Sir Lynden Macassey and Mr. (now Sir Arthur) Quekett are misspelt, and the printers give us 'parlimentary,' 'caritable trusts acts,' 'perogative' (five times), and 'Court of Appeals'; there is an incorrect footnote reference on p. 18.

The story of the classification and publication of our Statutory Rules and Orders is the story of one man's ingenuity and patient labour. That man is Mr. Alexander Pulling, who first, in 1886, indexed and classified the mass of Orders in Council and departmental material buried in the *London Gazette* from 1830 to 1883, and whose subsequent work in indexing all rules and orders in force, and in editing annual volumes of their text was recognized as a model and was officially standarized when the Rules Publication Act was passed in 1893. That Act was an unhappy compromise; it urgently needs replacement, and Northern Ireland has already improved upon it. Except for occasional judicial *dicta*, neither the lawyers nor the laymen of this country realize the extent to which they are affected by the rules, regulations and orders without which many modern Acts of Parliament can neither be worked nor comprehended. Competent observers from overseas like Dr. Fairlie or Dr. James Hart (who glanced at English parallels in his 'Ordinance-making Powers of the President of the United States') do not under-estimate the significance of this part of our administrative machinery.

C. T. C.

Harris's Criminal Law. Fourteenth edition. By A. M. Wilshere. London: Sweet & Maxwell, Lim. 1926. xix and 607 pp. (15*s.* net.)

In the case of a book which has reached its fourteenth edition it is superfluous to say that there is no fault to be found with the original plan of the book nor with such parts of the original text as have survived successive revisions. The essential features retained in this last edition are both rational and admirable. The well-known divisions of the book dealing with the nature of and participants in crime, offences of various descriptions, criminal procedure and the special part on summary jurisdiction are all clearly sub-divided again, and each aspect of the matter and the various offences are carefully listed and considered.

A serious objection is that in dealing with changes in the law the editor has taken the line of least resistance, and found it more convenient to insert whole sections of new Acts verbatim instead of making at least some attempt to state their effect shortly, simply and free from the redundancies and circumlocutions inseparable from Parliamentary jargon. Surely students, and even practitioners, may expect a little more

from text-book writers than the mere reprinting of Acts of Parliament, especially when, as in this case, it is claimed that the book is 'clearly and simply written.'

The editor has occasionally gone further than mere compilation, and made some valuable original contribution, such as the endeavour to draw the lessons of the case of *Director of Public Prosecutions* v. *Beard*, on the question of drunkenness as affecting criminal responsibility. One would wish that he had always followed that method of treatment and presentment, not only for judicial decisions, but also for legislative enactments, instead of arid quotations from the statute book. One would wish, for instance, that when telling us of the penalty incurred under section 11, Geo. 2, c. 9, by a tenant who fraudulently removes his goods to prevent the landlord distraining, the editor had warned us of the importance or pitfall in the word 'his,' and told us that the Act does not apply if the tenant has somehow or other (*e.g.* by a bill of sale) previously parted with the property in the goods (*Tomlinson* v. *Consolidated Credit Corporation* (1889) 24 Q. B. D. p. 135).

As in former editions, the book includes a very convenient table of indictable offences, &c., and specimen forms of indictments, and a moderately full index.

A. C. W.

Tristram and Coote's Probate Practice. Sixteenth edition. By A. Fitz G. Hart, C. T. A. Wilkinson, and W. E. Willan. London: Butterworth & Co. 1926. lxxxvi and 1073 pp., and 69 pp. index. (£2 10*s.* net.)

The consolidating Acts of 1925 called for a new edition of this indispensable compendium of the law and rules relating to the common form and contentious practice in probate matters. The book deals exhaustively with every possible branch of the subject: the obtaining of grants (whether general or limited), the kind of testamentary papers which may be proved, the evidence required, renunciation, revocation, resealing of grants, the practice relating to caveats, citations, &c. In the part relating to contentious business the procedure from the initiation of the action right down to judgment, appeal and costs is fully and clearly explained. In all cases care has been taken to state both the old and new practices, with the result that the practitioner will find the information he may want whether in contentious or non-contentious cases, and whether arising before or since the coming into force of the new Acts.

Over four hundred pages of extremely valuable appendices include all relevant statutory provisions, rules and orders, table of fees and costs, and, most valuable of all, a very full set of forms of all documents which may be required, affidavits, bonds, caveats and forms of pleadings, statements of claim, defence, &c. There is a final appendix containing miscellaneous information, such as directions issued under the new Acts and as to estate duty. The index is very full.

The timely publication of the book and the care with which it has been adapted to the recent legislative changes deserve not only success but also impartial and unqualified commendation.

A. C. W.

Company Law; being an exhaustive and critical Commentary on the Indian Companies Act, 1913, together with the Indian Companies Rules and Forms thereunder. By KAIKHOSRU J. RUSTOMJI. Lahore: Empire Law Publishing Society. 1926. 8vo. xix and 450 pp. (*Rs.* 15.)

MR. RUSTOMJI'S reputation is already well established as a clear expositor of Indian law who is not afraid to think for himself. In the present volume he has essayed a very difficult task with a considerable measure of success, namely, to produce an elementary text-book suitable for beginners in a branch of the law which is still unfamiliar to the greater part of India, while not forgetting that those same beginners may at any moment be called upon to solve the most advanced problems with the uncertain help of a library designed entirely for other purposes. The futile practice of some Indian text-book writers is to refer to numerous English rulings, but to leave the reader entirely in the dark as to who gave the ruling, what he said and on what issue. Mr. Rustomji, on the other hand, commonly gives the facts of the case, quotations from the judgments and the names of the Judges who delivered them, thereby making his book of some use even to those who have no access to the English Law Reports. His handling, for instance, of the question of one-man companies (a problem which is bound sooner or later to prove a stumbling-block in the land of *benami*) is excellent, as is also his exposition of *Bahia* v. *San Francisco* and similar cases on pp. 48—50.

Space and expense have been saved by omitting the little-used titles of Indian decisions; references should, however, have been given to a larger variety of alternative reports. S. V. FG.

Trial of Criminal Cases in India. By A. SABONADIÈRE. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co. 1926. 8vo. viii and 692 pp. (25*s.*)

THERE is much in this welcome book which will be of great service to beginners in Indian judicial work; and there would probably be still if Mr. Sabonadière had not been quite so modest. One cannot help feeling that in the endeavour to efface his own personality he has often toned down what might have been illuminating records of experience into elusive generalities. For instance, on the all-important subject of the use of police diaries by the Court, every Judge or magistrate of experience will recognise the truth and value of what is said on p. 63. But a beginner will hardly understand it without concrete examples, of which any civilian of Mr. Sabonadière's experience could have given many of interest. Thus, a 'wobbly' magistrate will often allow himself to be influenced by a statement in the diary that 'the accused admitted the offence'; though such a confession is, of course, inadmissible, and nothing is easier than to put it in the diary, though it never really took place. On the other hand the diary may reveal, *e.g.* that the police made no inquiries except from known enemies of the accused, whom the

complainant produced for the purpose, or that they have not produced persons whom they ought to have produced who would give evidence favourable to the accused, or that an unexplained delay occurred between the information and the investigation, or between the alleged offence and the laying of information (this will appear not only in the diary, but also in the 'first information report'). Skeletons of police diaries and specimens of the important reports, such as first information and inquest reports, might be constructed to show what a magistrate should be prepared to criticise. The method followed on pp. 333—339, with reference to judgments, would be still more useful with reference to these less obvious parts of a case which a beginner often finds so difficult and so tiresome. Outlines of specimen cases under section 110, *e.g.* against a village bully and against a caravan of gipsies, would have been useful. Incidentally, the effect of sections 25—27 of the Evidence Act is over-stated on p. 64: those sections do not prevent the police giving evidence of self-exculpatory statements made by the accused, though such statements may often be more damning than confessions.

Again, it would be monstrously unjust to suggest that the police or the Bar as a whole are anything but highly honourable bodies of men anxious to further the ends of justice. The author is rightly careful to avoid any such imputation. But there are black sheep in every profession, and a little plain speaking about bribery, intimidation, tuition of witnesses, the improper use of copies of evidence, and kindred matters would have been of value to the beginner. So long as we deal merely in generalities it is difficult to give the necessary warning without giving a wholly false impression. Concrete instances (of course with due suppression of names and other identificatory details) would not be open to this objection. Room might have been found for all these things if the author had allowed himself a freer hand: paraphrasing the Code will not absolve a student from mastering the Code itself.

All this, however, is merely to say that a valuable book might be better still. May its second edition soon be called for.

S. V. FG.

The Rating and Valuation Act, 1925, *with Statutory Rules and Orders, Official Circulars and Forms and List of New Rating Authorities, &c.* By HERBERT DAVEY (of the Middle Temple, Barrister-at-Law). London: Stevens & Sons, Lim. 1926. 8vo. xxvii and 464 pp. (25*s.* net.)

THE new Rating Act was bound to produce a handsome crop of books, both new and revised. Mr. Davey has not incorporated the new material in his earlier *Law of Rating*, but has compiled a new work.

After a short introduction summarising the effect of the Act, he proceeds to set out the text of the Act with annotations and cross-references to other sections and relevant rules and orders. This occupies pp. 1—144. Then follows a list of incorporated statutes, and they are set out with short notes and references on pp. 145—252.

Appendix B gives a list of the new rating authorities in each county.

Appendix C consists of some 120 pages of circular letters, orders, rules

and orders: the departments concerned have been very profuse in their instructions and explanations as to the proper method of administering the Act, and it will be of considerable assistance to all concerned with the Act to have this collection, and to have the keys provided in the notes to the sections and in the index, which seems to have been prepared with great care. Mr. Davey would be the last to claim that the book contains much original matter: it is without doubt, however, a useful service to have collected all the legislative and administrative orders that will be in force under the Act, and to have provided adequate means of reference. Unfortunately for all editors the issue of rules and orders has not yet ceased, and to this extent it has already become necessary to add to Mr. Davey's collection. M. E. R.

The Death Duties, comprising Estate, Legacy and Succession Duties. The Law and Practice and the Text of the Statutes. Fifth edition. By Robert Dymond, of the Estate Duty Office, Somerset House, assisted by G. M. Green, LL.B. (Lond.), of the Estate Duty Office. London: The Solicitors' Law Stationery Society, Lim. 1926. 543 pp. (15*s.* net.)

Earlier in 1926 a new book on Estate Duty, by Messrs. Wolfe & Dewar, was published by the Oxford University Press: it contained some 250 pages. In 1925 the 7th edition of *Hanson's Death Duties* appeared, running to nearly 700 pages. Those who, by inclination or the force of uncontrollable circumstances, are confronted with the many problems of this difficult subject, have now a choice of three up-to-date works. For a preliminary statement they can use the smallest; for problems requiring the utmost detail the largest; but in neither case would it be a waste of their time to see what Mr. Dymond and Mr. Green have to say. The fourth edition of this book was issued as recently as 1925: the present edition treads on its heels because of the prevailing influence of the new property laws, and the opportunity has been taken of incorporating the latest decisions and of adding new matter. The result is very complete, the arrangement is good, illustrations are given for many propositions, and each head, the Estate Duty, Legacy Duty and Succession Duty is given equally careful attention.

The issue of four previous editions is sufficient proof that this book has proved itself of practical value, and in noting the advent of the new edition it will be sufficient to add that its utility is very considerably increased by the remarkably good index, the part of a book most neglected and most essential to the practitioner. M. E. R.

A Compendium of the Law of Torts. By the Hon. Sir HUGH FRASER, one of His Majesty's Judges. Eleventh edition. By ROLAND BURROWS, M.A., LL.D. 1927. London: Sweet & Maxwell, Lim. 8vo. xxxvi and 300 pp. (12*s.* 6*d.* net.)

THE fact that the present edition of this well-known work is by Mr. Burrows is a guarantee of its excellence. Most of the important recent cases, such as *Hambrook* v. *Stokes* and *Buckle* v. *Holmes*, for example, are included. *Weld-Blundell* v. *Stephens* is the only case for whose omission it is difficult to account, and although *Sorrell* v. *Smith* is cited, there is nothing to show the student that this is now the leading case on the subject. We doubt whether the statement as to the measure of damages on p. 253 will be intelligible to the student. It is stated in heavy type that the general rule is that the wrongdoer is liable for the 'natural and probable consequences' of his act, while at the bottom of the page the rule as to direct consequences is given. The latter rule seems to us to have displaced the former.

Although this book does not aim to be a substitute for the larger works of Pollock or Salmond, it does give an excellent summary of the law, and can be read with great benefit to the student in conjunction with them.

Cases on Contract, with Chapters on Certain Special Contracts. By MICHAEL E. ROWE, B.A., LL.B. London: Stevens & Sons, Lim. 1927. 8vo. xx and 392 pp. (15*s.* net.)

THIS book strikes a new line in the various collections of cases on contract. It contains a very clear summary of the essential facts and the bare decision, with the addition of instructive passages from the judgment. Mr. Rowe has accomplished his object in providing students with a very helpful case book which can be referred to when reading any of the standard text-books, where the law reports are not available. There is much to be said in favour of the view that it breaks 'the thread of the text-book's argument' when numerous law reports have to be consulted. About three hundred and twenty cases are given, and these have been very well chosen to illustrate the basic and elementary principles of the law of contract, together with such special subjects as Agency, Sale of Goods, Negotiable Instruments, Bailments, and Carriers. The book supplies a real need, and will be of invaluable assistance to every student.

Seaborne's Vendors and Purchasers of Real and Leasehold Property. Ninth edition. By W. Arnold Jolly, M.A., and C. H. S. Fifoot, M.A. London: Butterworth & Co. 8vo. lxxii, 396 and 44 pp. (Price 21*s.* net.)

This edition of an old and useful treatise contains the modifications which have become necessary in consequence of the new Acts affecting the law of property. The original scheme, including all the accustomed features of the work, has been retained, while the relevant alterations find their appropriate places in the text. A masterly and comprehensive review of the principal changes which have been introduced by the new Acts is contained in a short introduction, which does not exceed four pages in length. There is a table of statutes and an extensive table of cases. The editors modestly offer the book in the hope that it does not contain numerous or important errors in interpretation, and, in fact, this edition appears to be singularly free from mistakes, having regard to the necessarily brief character of the dissertations and notes. We think that mention should have been made of section 194 of the L. P. Act, 1925, which relates to restrictions on commons, as the consent of the Minister of Agriculture and Fisheries to the erection of any building which impedes access to a common within the meaning of the section would be a necessary part of the title to that house. For its size the book is a remarkable compendium of the points of conveyancing and law which should be present to the advisers of a purchaser before, during and after completion.

A. S. O.

The Laws of the Straits Settlements (Edition of 1926). Revised up to and including December 31, 1925, but exclusive of War and Emergency Legislation. Published for the Government of the Colony of the Straits Settlements by the Crown Agents for the Colonies, 4 Millbank, Westminster, S.W. 1, and printed by Waterlow & Sons, Lim. Five vols. 1926. La. 8vo. Vol. I, 835 pp.; Vol. II, 881 pp.; Vol. III, 876 pp.; Vol. IV, 1018 pp.; Vol. V, 176 pp. (Price, Vols. I to IV, 24*s.* 6*d.* each; Vol. V, 7*s.*)

The Law of the Straits Settlements is the common and statute law of England as it existed on the issue of the charter of 1826, qualified by local enactments. Before that year Singapore and Malacca were within the jurisdiction of the Supreme Court of Bengal, and this Anglo-Indian influence survives in the Penal Code, the Evidence Ordinance and the Penal Procedure Code. Besides these laws of Anglo-Indian origin, the enactments contained in these volumes reproduce a great deal of fairly modern British legislation.

The Colony has not been dilatory in law making. The 239 existing ordinances appear to cover all points of law and procedure likely to arise in any civilized community. Adjective law provides the two longest

ordinances—the Civil Procedure Code and the Criminal Procedure Code. There are also ordinances governing evidence and limitation, reproducing exactly the Indian Evidence Act of 1872 and the Indian Limitation Act.

The Penal Code is the most solid enactment in the domain of substantive law. With trifling exceptions and omissions this Code is a reprint of the Indian Penal Code, and, therefore, the work of Macaulay. Other enactments include a Conveyancing and Law of Property Ordinance, complete with statutory forms; a Companies Ordinance, a Consolidating enactment with Table A in the schedule; and up-to-date Bankruptcy and Municipal Corporation Ordinances. The familiar form and features of these enactments betray an obviously British parentage, and do not carry one's vision far from Lincoln's Inn or the Temple, but the many Ordinances dealing with such subjects as Hindu widows, piratical native vessels, Mahomedan law and custom, the destruction of mosquitoes, Singapore traction, rubber restriction, Cocos Islands administration and Malacca lands customary rights, show that this mass of legislation is really devised for the benefit of peoples 'somewheres East of Suez.'

Vol. V contains only private Ordinances. There is no index, but an alphabetical table of contents to each volume partly supplies its place; and a useful feature is that the number of the Ordinance is printed in bold type at the top of each page over which that Ordinance extends.

An Introduction to the Law and Tradition of Medical Practice. By W. Sanderson, M.A., LL.B., and E. B. A. Rayner, B.A., LL.B. London: H. K. Lewis & Co., Lim. La. 8vo. xiv and 75 pp. (Price, 7*s.* 6*d.* net.)

As the authors of this book say in their introduction, 'The practitioner who engages in the art of Medicine is in an onerous position, for he acquires a status which imposes upon him obligations . . .' This book is a very condensed account of these obligations, some of them statutory and some traditional but all binding. Under the heading of Purpose and Politics of Medicine a very interesting account of the origin of the traditions and law alike is given, and it is shown how laws are often the crystallized traditions, regularized to the one aim of securing that the service of the race shall be to the race's best advantage. The practitioner is but the instrument. Even now tradition in medicine—as in other honourable callings—is more highly developed, though not legally binding, than are the laws which govern practice. This is clearly set forth (p. 11), and if a hard saying, which it sometimes proves, to the honour of doctors be it said that they endeavour to uphold their traditions in the face of Law.

An historical outline of the various original bodies who were empowered to grant licences to practice follows, and their evolution from the older apprentice system is traced. The apprentice obtained originally in Medicine as in other skilled callings. The earliest statute requiring some examination or licence to be held by a practising physician or surgeon appears in 1581. Prior to this the Church and Medicine were often closely allied, the monks especially practising minor surgery.

The first statute, 1581, even then applied only to London and a radius of seven miles. What a paradise for quacks!

The Barber-Surgeons, afterwards the College of Surgeons, and the College of Physicians existed before this as Companies, but had no powers of regulation.

The first licensing body was that of the Society of Apothecaries Company, who in 1784 were allowed to appoint an examining body. The modern practice of medicine and surgery is governed by the Medical Act of 1858.

After a very lucid statement of traditional medical etiquette—not always observed, alas! to the full—the question of legality of operation is discussed. This is of contemporary interest to-day as bearing on the question of sterilization of defectives. Lord Justice Atkin's opinion is given at length by the authors. His view is that an alteration in common law must be placed on the statute book before a surgeon can with safety perform such an operation; and that, even with the consent of the patient, a prosecution might follow, though not an action for damages.

Under the heading Language of Medicine an account is given of the origin of various terms and symbols used in medicinal practice to-day, interesting, but not, one suspects, entirely conclusive. The final chapter deals fully with the much-vexed question of negligence. The authors take a more lenient view of this than one would expect, for they practically state that ignorance is permissible as a defence if the practitioner acts in all good faith. One fears that every law officer would not be so tolerant! Altogether a book which the young Doctor of Medicine especially should read. Whilst easing his mind on some points it will certainly not lessen his sense of obligation to himself and the public he serves.

F. C. L.

Criminal Procedure in British India. By Sir John Woodroffe. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co. 1926. La. 8vo. 827 pp. (£2 6*s*. 8*d*. net.)

This work, which is a commentary on Act V of 1898 as amended up to date, embodies the result of a great many rulings laid down by various High Courts in India. The commentator appears to have taken great pains to make the book as useful and up to date as possible. The book is strongly recommended to the profession in India, especially to those who take interest in the administration of criminal justice in that great dependency, particularly when it comes from the pen of one who was a distinguished author with judicial experience during his stay in Bharat-barsh.

A. M.

Books also received:—

Trade Unions and the Law: their History, Present Position and Suggested Reform. By E. P. Hewitt, K.C. London: Solicitors' Law Stationery Society, Lim. 8vo. 40 pp. (2*s.* net).—This reprint of articles from the *Solicitors' Journal* gives a useful view of the subject, with as much of the history as is required for ordinary purposes, and judicious comments. Mr. Hewitt wisely avoids crying over spilt milk, and confines his proposals for amending the law to such as appear to be within reasonable expectation. Those who are interested in trade union law, and not yet acquainted with its details, cannot do better than study his exposition. On the point of picketing he does not mention that no statute has authorized collective persuasion to be carried to the extent of committing a breach of the peace or giving ground for reasonable apprehension of it. The common law against unlawful assemblies, whatever their purpose may be, is not repealed. But perhaps this is of little practical importance; an indictment at common law for unlawful assembly is a cumbrous remedy at best, and might be precarious.

International Private Law or the Conflict of Laws. By W. Nembhard Hibbert. New and revised edition. London: University of London Press, Lim., 1927. 8vo. xl and 237 pp. (10*s.* 6*d.* net).—This book was noticed here on its first appearance (L. Q. R. xxxv, 108); its general features are unchanged, and it has been duly noted up. We are startled by the assertion that, 'since India is for the most part subject to the sovereignty of the English King . . . therefore English internal law is the general law of India.' This is not only erroneous but heretical. English law as such has never been applied in India to Indians. Has Dr. Hibbert never heard of the Bengal Regulation III of 1793, and the Judicial Committee's interpretation thereof? The general law of British India, apart from specific legislation, is not English law but 'justice, equity and good conscience' in an English judicial version.

The Classics. By the Right Hon. Lord Hewart of Bury. Manchester: At the University Press. London: Longmans, Green & Co., Lim. 8vo. 33 pp. (1*s.* 6*d.* net).—This excellent address may be confidently commended to those of our readers who are humanists—and even to those who, not knowing Greek and Latin, are at all curious to be informed why books in those tongues are interesting. One might wish that the Chief Justice could have said something about the place of Latin in legal studies; but the president of the Classical Association, addressing it only in that capacity, was clearly bound to abstain from professional digression.

The Law as to C.I.F. Contracts. By H. Goitein, of Gray's Inn, Barrister-at-Law. Second edition. London: Effingham Wilson. 1926. xv and 112 pp. (4*s.* net).—The value of this book, both to the legal profession and to merchants, is shown by the demand for a new edition so soon after the book was first published. The learned author, who is one of our valued contributors, has incorporated the recent decisions, which, of course, are not numerous in such a limited branch of the law of contract. The text remains substantially unchanged, although there are some minor corrections.

Where to Look for Your Law. Third edition. Revised to October, 1926. London: Stevens & Sons, Lim. 125 pp. (1*s.* net).—This book will prove of great practical use both to the practitioner and the student. Without claiming to be in any sense exhaustive, it gives a reference to the leading text-books on almost every branch of the law. We have used it on many occasions and have found it accurate and up-to-date. The section on Constitutional Law and History ought, however, to be revised in the next edition. At a time when there are frequent complaints concerning the costs of books, this little volume is extraordinary good value for the money.

Year Books of Edward II. Vol. XIV (Part II). 6 *Edward II.* A.D. 1313. Edited for the Selden Society by WILLIAM CRADDOCK BOLLAND. London: Quaritch. 1927. 4to. 1 and 222 pp.—Mr. Bolland continues his patient and judicious endeavours to construct from fourteenth-century reports an approximately correct image of what the procedure in Court was really like. Many things have to be frankly left doubtful, but much is gradually being cleared up.

General Index to the English Historical Review. Vols. XXXI—XL. 1916—1925. Edited by REGINALD L. POOLE (to Oct., 1920) and GEORGE NORMAN CLARK (Assistant Editor, Jan., 1920; Editor from Jan., 1921). London: Longmans, Green & Co., Lim. 1927. La. 8vo. 64 pp. (6*s.* net).—It is hardly necessary to remind our readers that the *English Historical Review* often contains matter of considerable importance for legal history, such as, to take a notable example in the period covered by this index, Prof. Pollard's discoveries about the Council and the Star Chamber.

The Yearly Supreme Court Practice. 1927. By Sir WILLES CHITTY, Bart., and H. C. MARKS, assisted by F. C. ALLAWAY. Two vols. London: Butterworth & Co. 8vo. ccccIxxiv, 2543 and 362 (index) pp. (40*s.* net, thin edition 5*s.* extra).

Mews' Digest of English Case Law. Second Edition. Second Annual Supplement, containing the cases in 1926. By AUBREY J. SPENCER. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1927 La. 8vo. xx and 410 pp.

The Annual County Courts Practice. 1927. Edited by His Honour Judge RUEGG, K.C., assisted by H. P. STANES. Costs and Court Fees by Arthur L. Lowe, LL.B., and F. G. Glanfield, LL.B.; Admiralty and Merchant Shipping by H. H. Sanderson; Workmen's Compensation by F. E. Ruegg. London: Sweet and Maxwell, Lim.; Stevens & Sons, Lim. 8vo. cxxxix, 2543 and 221 (index) pp. (40*s.* net).

*** Further acknowledgments of books received are held over for want of space.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

Books for review should be sent to the care of the Publishers. All other editorial communications should be addressed to Mr. A. L. Goodhart, 13 Old Square, Lincoln's Inn, W.C.2.

THE

LAW QUARTERLY REVIEW.

No. CLXXI. July, 1927.

NOTES.

Re Wait.

The decision of the majority of the Court of Appeal (Lord Hanworth M.R. and Atkin L.J., Sargant L.J. dissenting) [1927] 1 Ch. 606; 96 L. J. Ch. 179, will, I venture to think, be as inconvenient to many merchants as it is surprising to the Equity Bar. For the present it is final, being an appeal from a Divisional Court in bankruptcy. The facts are simple. X, by a contract which clearly passed the property, bought from Z an ascertained parcel of 1,000 tons of wheat about to be shipped by a named vessel to Bristol. He then sold 500 tons of this parcel by the same description to A, who paid the price (less half freight) by cheque. Before the ship arrived with the 1,000 tons in bulk X was adjudicated bankrupt, nothing having been done to appropriate A's 500 tons. It may be observed at once (though perhaps it is not material) that at common law the sub-sale by X imported something more than a mere executory contract; it carried a licence to A to appropriate 500 tons out of the 1,000 tons to the fulfilment of his contract if and when he found opportunity. All he could do, however, was to move the Bristol County Court to order the trustee in bankruptcy to deliver 500 tons or alternatively to repay the purchase-money paid. The former relief was refused, the latter granted; on appeal and cross-appeal Astbury and Lawrence JJ. held that A was entitled to 500 tons as 'specific goods' under the Sale of Goods Act, 1893, ss. 52, 62 ([1926] Ch. 962: the point of equitable

assignment was not much discussed). On appeal by the trustee the Court of Appeal held, by the majority above stated, that there was no equitable assignment at all and the goods claimed were not specific goods. The result is to leave A with nothing but a right to prove in the bankruptcy for the money he has paid in vain.

Now, first, on the rule of equity, this is clean contrary to Lord Cranworth's observations (not necessary to the decision, but considered) in *Hoare* v. *Dresser*, 7 H. L. C. 317. Directions to let a merchant have 100 quarters of wheat out of a cargo of 500 quarters (this clearly means that they are not yet appropriated) have the effect that 'equity will give the merchant a lien upon the larger cargo.' If the goods were already appropriated there would be no need to talk of lien; and the comment in Atkin L.J.'s judgment, if made in any place of less authority, could only be called a strange misunderstanding. Again, Lord Westbury said in *Holroyd* v. *Marshall*, as reported in 10 H. L. C. at pp. 209, 210, 'a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property.' But the Law Journal report, it is said, reads 'the 500 chests of a particular kind of tea which are now in my warehouse in Gloucester.' If those were Lord Westbury's words he uttered a truism too familiar even to novices to call for repetition; and such (we need hardly remind those who have read his judgments) was never his manner. Besides, in the time of the 'authorized' reports which preceded the establishment of the Law Reports there was a distinct, though not conclusive, presumption that if different reports varied the 'authorized' one was correct. What real authority is there to set against these pronouncements, which equity lawyers have accepted in their natural sense and followed as a safe guide for more than half a century? With all respect for the majority judgments now under consideration, the only answer I can find is: None. The reader is referred for details to the exhaustive discussion in Sargant L.J.'s judgment. The argument was more or less confused by reference to some not wholly felicitous language in *Holroyd* v. *Marshall* about specific performance; but on that point Lord Macnaghten gave, nearly forty years ago, a full and clear warning which there is really no excuse for neglecting: *Tailby* v. *Official Receiver*, 13 App. Cas. at pp. 545, 547. If I seem to speak presumptuously, I can only regret that time and space do not allow me to discuss the report line by line.

Next, as to the point on the Sale of Goods Act, the majority judgments are driven to take the position that where the Act speaks of a contract to deliver specific or ascertained goods 'it is not easy to discover the reason for adding the words "or ascertained"': *per* Atkin L.J., [1927] 1 Ch. at p. 630. In other words a specially expert and concise draftsman set down, and departmental and professional criticism approved, an idle use of two synonymous epithets instead of one. That is not, at any rate, what the learned draftsman thinks. In his note on section 62 Sir Mackenzie Chalmers, having put the very case of 'a contract for the sale of an unascertained portion of a larger ascertained quantity of goods,' says that 'for some purposes this would be regarded as a contract for specific goods, while for other purposes it would be regarded as a contract for the sale of unascertained goods'; and this with the word 'identified' before him in the statutory definition of 'specific.' Thus either goods can be specific without being ascertained, notwithstanding the reluctance of two members of the Court of Appeal to believe it, or Sir Mackenzie Chalmers did not know his own business.

Reading the majority judgments, a modern equity lawyer cannot but feel that he is walking in a shadow of archaic superstition. Old-fashioned common law pleaders, on the principle of *omne ignatum pro nigromantico*, deemed all equitable notions a kind of unholy juggling, to be tolerated at need, but if possible discouraged. Their Chancery rivals rather liked a screen of mystery and were at no pains to undeceive them. Selden, indeed, might plausibly call equity a roguish thing when the Chancellor's Court had no settled rules and the Chancellor or Lord Keeper was not sure to be impartial or even learned. It was left for Blackstone to explain at some length that such terms were not applicable to the systematic equity doctrine of the eighteenth century. He was clear enough, and his tone even more modern than Story's; but I do not think the pleaders of the Temple told their pupils to read Blackstone, any writings that were not pleadings, or at least ancient books of authority, being in their eyes frivolous at best, and worse if they were readable. On the other hand it must be allowed that certain Vice-Chancellors not yet beyond living memory were sadly to seek in the rudiments of the Common Law—but not so Cranworth or Westbury.

One day the House of Lords may have occasion to consider this novel doctrine in some other connexion. Meanwhile it will be curious to see how it is received in independent jurisdictions.

F. P.

Republica de Guatemala v. *Nunez* [1927] 1 K. B. 669; 96 L. J. K. B. 441, C. A., is a curious addition to the cases in which all the members of a strong Court have arrived at the same result, but all for different reasons. The facts were peculiar and (*per* Scrutton L.J.) picturesque, but (so far as material to the point reported) not complicated. G. made in Guatemala a voluntary assignment in writing to N. of a sum deposited by G. in a London bank, both G. and N. being domiciled in Guatemala and N. being a minor. The reported decision is on the one question whether N. could overcome the following objections to his title:—(1) the law of Guatemala required certain formalities for a voluntary assignment of money, which were not observed; (2) by the same law a minor could not even accept such an assignment except by the consent of a judicially appointed representative *ad hoc*, and this requirement also was not satisfied. Bankes, Scrutton and Lawrence L.JJ. all agreed with Greer J. that N.'s claim failed. We take Lawrence L.J.'s reasons first and submit that they are the most convincing. The sum deposited in London was, of course, a debt from the bank. Had it, like coin or other corporeal chattels, a local situation? If it had, a transfer of it was governed by the *lex situs*, namely, English law, according to settled authority (notwithstanding *Lee* v. *Abdy*, 17 Q. B. D. 309, so far as it may really be to the contrary). In the present case the transaction was, in common sense, as English as possible; and, if we consider the intention of the parties, now a much weightier element in conflict of laws cases than the older books allowed, surely a depositor in an English bank may be presumed to authorize the banker to act on instructions given according to the law and custom governing the bank's domestic business. Objection (1) therefore fails. But as to objection (2), N.'s disability to accept such a donation was a matter not of form but of substance, being part of his personal law. Therefore N.'s claim breaks down on this (though *quaere* if the incapacity had been of a kind not recognized by our law). Even if it be arguable that the proper test of capacity is not the law of the party's domicil, but that of the place where the contested act in the law was done, no such question arises here, Guatemalan law being the proper one on either view.

Bankes L.J. apparently held both objections valid on the broad ground that the law of the assignor's domicil was the governing law throughout, but for reasons we fail to appreciate in detail. It seems to us, with great respect, that his judgment does not

distinguish between the title to property and the manner of transferring it, and also that the question before the Court had nothing to do with priorities in any known legal sense of the word. When a donor says his gift was void, that does not raise any question of priority between himself and the donee. We cannot see the relevance of the authorities cited in this judgment.

Scrutton L.J.'s judgment is in substance to the same effect as Lawrence L.J.'s on the point of the donee's incapacity to accept the gift without the special authority prescribed by the law of his domicil (being also that of the place where the gift was made). But he also held that the want of local formalities in the assignment itself was fatal, without considering the question treated (rightly, we think) as important by Lawrence L.J. whether the debt had a local English character. Perhaps the House of Lords will ultimately settle the difference. But can it really be sound mercantile doctrine (we ask with diffidence) that if a foreign customer deposits gold and also opens an independent deposit account with a London bank, the banker is to pay out the gold according to English law and deal with the credit balance according to a foreign law? What do the bankers say?

F. P.

Time serves only for brief mention of the decision in the House of Lords of *Lake* v. *Simmons* [1927] A. C. 487, reversing that of the Court of Appeal [1926] 2 K. B. 51; 95 L. J. K. B. 586, which was fully noted in this *Review* last October (vol. xlii, p. 441). As the result now stands the points are that (1) when manual delivery of goods is obtained by a trick such that there is no sale or bailment for want of real consent, the goods are not 'entrusted' to the trickster within the meaning of an exception to a policy of insurance against theft, (2) the fraudulent obtainer of the goods (who is really a thief) is not a 'customer' for the same purpose; on this, though there was no dissent, some of the Lords were more emphatic than others. The general view was that, the doctrine of larceny by a trick being well established, it will not do to make refined exceptions in applying the same principles to the civil consequences of the same actions.

The case of *Re Carnarvon's Settled Estates*, [1927] 1 Ch. 138; 96 L. J. Ch. 49, raised more than one point. The questions were raised upon two originating summonses in respect of two separate estates which had been consolidated. In August, 1925, the sixth Earl of Carnarvon was entitled to the Chesterfield Estate for life subject to a jointure rentcharge with remainders over in strict settlement under a compound settlement. On the same date he was also entitled to the Highclere Estate as tenant in fee-simple under a disentailing deed subject to a jointure rentcharge created by the settlement under which he had taken the entail then barred. He agreed to sell both these interests to the Carnarvon Estates Co., but on the first of January, 1926, no conveyance had yet been completed. It was therefore necessary to decide (a) whether these estates were settled land and if so (b) who was the person who had the powers of a tenant for life under the Settled Land Act, 1925, in whom the trustees of the respective settlements must vest the legal estate by a vesting instrument under S. L. A., 1925, Sched. II, Part I (2).

With respect to the Chesterfield Estate the first question raised no difficulty, since it was clearly settled land both before and after January 1, 1926. In the other case, however, there was more doubt, and the discussion of this point occupies the most part of the report. Romer J. held that although it clearly fell within the provisions of S. L. A., 1925, s. 1, it was not settled land in August, 1925. He distinguished the line of cases following *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, on the ground that there the jointures were to arise after the death of the person entitled in possession, although otherwise such person might hold a fee-simple interest. In the case under discussion the jointure took priority to the interest in possession and consequently it was not an estate 'limited to or in trust for any persons by way of succession.' There were not, in his view, any successive interests; a view, it is respectfully submitted, which is logically accurate.

The second question involved the preliminary decision whether a corporation could be a tenant for life or have the powers of a tenant for life since both sections 19 and 20 of the Settled Land Act require that the person shall be of full age. It was argued that as a corporation could never be a minor (*Salomon* v. *Salomon & Co.*, [1897] A. C. 22) it could not properly be described as of full age. The learned judge, however, held that the words of full age simply implied not being an infant and hence a corporation was within the provisions of the sections. In support of this it might have been pointed out that the Act

contemplates as trustee a trust corporation, *e.g.*, S. L. A., s. 94, sub-s. 1, and furthermore that a trustee shall have the powers of a tenant for life in certain circumstances, *e.g.*, S. L. A., s. 23, sub-s. 1. It is therefore respectfully submitted that no other decision could have been maintained.

The further question had to be decided whether in the circumstances the Carnarvon Estates Co. was the tenant for life of the settled estates for the purposes of the S. L. A., 1925, or whether the vesting instrument should be made in favour of the Earl.

In the case of the Carnarvon Estate it was settled land at the date of the contract of sale, so that even had the contract purported to include the powers of a tenant for life it would have been ineffective in this respect both under the old law (S. L. A., 1882, s. 50) and the new (S. L. A., 1925, s. 104). It was held that the Earl therefore remained tenant for life and the legal estate must be vested in him. On this subject two points, though not raised on the summons, may be worthy of notice. First, an application, with the consent of the Earl, might have been made to the Court under S. L. A., s. 24, sub-s. 1, to vest the powers of tenant for life in the trustees of the settlement, on the ground that the Earl had ceased to have a substantial interest in the settled land. Of itself this might not be of much value, but if the Estates Co. were to be appointed trustee of the settlement (although it does not appear to come under the provisions for making it a trust corporation, see S. L. A., s. 117 (xxx), amended by L. P. A., 1926, s. 3, unless indeed the Court would appoint it such for the particular case) considerable convenience might result from the employment of this provision. The other point may emphasise the desirability of this course in cases where the assignment took place before 1926. Under S. L. A., s. 104, sub-s. 3, the former rights of such an assignee are not to be affected without his consent, *e.g.*, not by sale under the statutory powers. Though the effect of this provision is minimised by the decisions in *Re Dickin & Kelsall*, [1908] 1 Ch. 213, and *Re Davies & Kent*, [1910] 2 Ch. 35, and by S. L. A., s. 104, sub-s. 5, protecting the purchaser from enquiry this appears to be worthy of consideration.

With reference to the Highclere Estate, the position was different. The land was not settled land prior to 1926, and hence the Earl was not debarred from assigning his whole interest, subject, of course, to the jointure rentcharge which had priority to it. The learned judge held that the Earl was not, in any case, tenant for life under S. L. A., s. 19, sub-s. 1, since he was

entitled to greater interest than that of his own life to which that section was limited. He further held that the powers under the Act must therefore be exercised by a person entitled under S. L. A., s. 20, sub-s. 1 (ix), as a person 'beneficially entitled to land for an estate in fee-simple . . . subject to . . . charges . . . subsisting . . . under a settlement.

Pausing here it may be well to note that it is this case which is governed by the Law of Property Amendment Act, 1926, s. 1, sub-s. 1, which provides that a legal estate may be conveyed or created subject to a prior interest as if the land was not settled land. It is submitted that this section contemplates that an estate so held by the Earl might have been conveyed to the company and *semble* dealt with as if it were not settled land. This would have avoided a vesting deed or treating the land as settled land. The company would have been beneficially entitled and hence enabled to perform the function for which presumably it was formed, subject of course to ensuring that the jointure rent charge was duly paid. The case under consideration was decided only two days after the royal assent was given to the 1926 Act, and it is natural perhaps that this point was not mentioned. In view of the actual decision it is respectfully submitted that resort to its provisions might have been the simpler course.

The learned judge decided that the person falling within the provisions of the section was not the Earl but the company. The apparent reason for this view, though not expressly stated in the judgment, appears to have been that, since the relation of vendor and purchaser existed, the Earl was trustee for the company, which was therefore beneficially entitled. It is to be regretted that the precise position of the parties under the contract was not more fully stated, *i.e.* whether the Earl had received the consideration due in respect of the sale, since it is submitted that on any other view this decision would carry the law of trusteeship in the vendor further than any previous decision. Though in argument the counsel in this case said, though no authority was cited, that the vendor was trustee for the purchaser this view does not seem to have commended itself in so absolute a form to all text writers and appears to be in conflict with the well-known case of *Ridout* v. *Fowler* [1904] 1 Ch. 658, in which the existing authorities were discussed and which was affirmed by the Court of Appeal [1904] 2 Ch. 93. In that case Farwell J. followed the judgment of Lord Hatherley in *Shaw* v. *Foster*, L. R. 5 H. L. 321, at p. 356, where the learned and noble lord adopted a passage from the

judgment of James L.J. in *Rayner* v. *Preston*, 18 Ch. D. 1, at p. 13, to this effect: 'I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another is in suspense so long as the contract is *in fieri*.' Farwell J. then referred at p. 662 to the case in point where the contract had been rescinded thus: 'Now here it is quite clear that the relationship of trustee and *cestui que trust* never was created by the completion of the contract.' It is submitted that this view of the law has never been overruled and has been substantially adopted in the cases of *Howard* v. *Miller* [1915] A. C. 318, at p. 326, and *Central Trust and Safe Deposit Co.* v. *Snider* [1916] A. C. 262, at p. 272, both judgments of Lord Parker, though there stress was laid upon the certainty that a Court of Equity would grant specific performance. The more recent case of *Golden Bread Co.* v. *Hemmings* [1922] 1 Ch. 162 is distinguishable as dealing simply with the rule that the property is held by the vendor at the purchaser's risk after contract and the vendor is in a fiduciary position with respect to any gain or loss. This proposition depends upon the decision in *Lysaght* v. *Edwards*, 2 Ch. D. 499, upon which the general principal is founded. To hold that the company was entitled to the legal estate as tenant for life and all that that implies, including the right to possession of the property, seems to go further than any existing authority, at least where the vendor has not received the full consideration for the property. The proposition would be perfectly logical if in fact a vendor is really a trustee in the normal legal sense of that word. To cite again from Lindley L.J. in *Rayner* v. *Preston*, *supra*: 'But where the contract is performed by actual conveyance or performed in everything but the more formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation throughout was that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust.' It is respectfully submitted that in *Re Carnarvon's Settled Estates* the facts must be presumed to have complied with this principle: that nothing more was required but the formal conveyance by the Earl, and that hence the company was in fact wholly beneficially entitled.

H. P.

The decision in *Re Leigh's Settled Estates (No. 2)* [1927] 2 Ch. 13, should it remain law, will be of the first importance. It is an excellent example of the far-reaching effect of an unexpected interpretation of a statutory enactment. The decision was made on a summons taken out to consider what effect, if any, the provisions of the Law of Property (Amendment) Act, 1926, had upon the order made on the previous summons reported in *Re Leigh's Settled Estates* [1926] Ch. 852; 95 L. J. Ch. 511 (noted *ante*, p. 16). In that case, where a trust for sale existed, subject to an equitable annuity created by the same settlement as the trust, Tomlin J. had held that there was no immediate binding trust for sale for the purposes of the Settled Land Act. He had held that 'binding' meant a trust for sale capable of overreaching all equities affecting the land subject to the trust for sale. This view of the true interpretation of the definition clause was rendered more difficult after the Act of 1926, applying section 2, sub-section 2, of the Law of Property Act, 1925, to all trusts for sale, where two trustees approved by the Court or a trust corporation were appointed trustees. If the definition section of the Act applied to section 2, sub-section 2, that sub-section would be meaningless because, since all trusts for sale must be capable of overriding all equities to be immediate and binding, a trust for sale constituted under its provisions would have no greater effect than any other trust for sale under the Act. Tomlin J. therefore held that trusts for sale, under this provision, came within the exception of the definition 'unless the context so requires.' That is to say, that apparently any trust for sale, which has complied with the condition respecting trustees, is capable of overriding all equities to which the land is subject. The learned judge further held that such trustees need not be appointed or approved by the Court *ad hoc*, but if, in fact, they had been appointed under an order of the Court, *e.g.*, in this case the settlement had been directed by the Court, this would suffice.

This interpretation appears logical enough, if the premiss of the decision in *Re Leigh Settled Estates* (*No.* 1) is accepted, but, it is respectfully submitted, is rather more far-reaching than can have been foreseen by the draftsman of the Acts. Judging from the abbreviated report, it is immaterial that the trust for sale is not even immediate, since the definition clause does not apply. If that be so, it would seem that a settlement on A for life with remainder to trustees for sale could be overridden, in effect, by the trustees retiring in favour of a trust corporation, so as to enable the life interest to become subject to a trust for

sale. This would certainly tend to defeat the intention of the settlor, and make this form of settlement rather difficult in practice. It is, therefore, somewhat dangerous to prophesy the line of development of trusts for sale under L. P. Act, section 2, sub-section 2.

There is another side to the problem raised by this decision, namely, the relation of the general provisions of these Property Acts to the three kinds of immediate trust for sale that have now been created. There is the trust for sale, which, even though immediate, is not binding in the sense that it is capable of overriding all equities. This will normally be settled land, and some nice points will arise as to the persons in whom the powers under the Settled Land Act are vested. Such trusts for sale will, in effect, not be trusts for sale, but if, and in so far as, they are, they will not be subject to any of the rules laid down in the Acts as, for example, rendering two trustees necessary to receive capital moneys. Secondly, there is the trust for sale that is immediate and binding, which does not fall within the provisions of L. P. Act, section 2, sub-section 2. That these trusts were intended to fall within the general provisions of the Acts respecting trusts for sale may, it is submitted, be inferred from L. P. Act, section 2, sub-section 1, which expressly refers to trusts for sale capable of overriding equities independently of the Act. If that is the correct interpretation, it would then seem that all the general provisions are governed by the interpretation clause that the trusts must be immediate and binding Accepting that view, further interpretation yet will probably have to be given to the third class, namely, the trusts for sale under the L. P. Act, section 2, sub-section 2, viz., that since they were manifestly intended to come within these general provisions, conferring powers on trustees for sale, etc., such a trust for sale must become *ipso facto* immediate and binding, and indeed this would appear to have been decided in *Re Leigh's Settled Estates* (*No.* 2). The decision gives support to the view just expressed respecting the relations of the kinds of trusts for sale to the general provisions of the Act, but what will be the effect of constituting any trust for sale, however remote, an immediate binding trust for sale by appointing a trust corporation trustee, it is difficult, it is very respectfully submitted, to foresee.

H. P.

In delivering the judgment of the Privy Council in *British Columbia Electric Railway Co., Ltd.* v. *Loach*, [1916] 1 A. C. at p. 727, Lord Sumner said: 'The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough.' It is unfortunate therefore that at the present time the terms in which the law of torts is expressed seem to be growing more difficult and complicated. We are not certain that the meaning of such phrases as 'chain of causation' and 'novus actus interveniens' may not elude the quick comprehension of a common jury. Would such a body of laymen be greatly assisted by the well-known description of the latter expression given by Lord Sumner in *Weld-Blundell* v. *Stephens*, [1920] A. C. at p. 986: 'It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that, in a word, he insulates A from C.' Nor are the leading authorities always in agreement as to which particular metaphor or simile is correct. In *Leyland Shipping Co.* v. *Norwich Fire Insurance Society* (1918), 118 L. T. 120, Lord Shaw said: 'Causation is not a chain, but a net. At each point, influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely.'

Some of the difficulty in analysing the various judgments in *S.S. Singleton Abbey* v. *S.S. Paludina*, [1927] A. C. 16, 95 L. J. P. 135, seems to be due to the use of these metaphors. It is necessary not only to understand the facts—which, although in dispute, seem comparatively simple—but also to unravel a complicated series of links and missing links. 'There is another link' says one of the judgments 'in the chain missing, and the missing link is to be found—or the place where the link ought to be but is missing from—is found in the action of the master of the *Singleton Abbey*' ([1927] A. C. 22). With all respect, we feel that Lord Blanesburgh's short judgment, unenlivened as it is by any metaphors, adequately states the point at issue in a way that a jury could follow. The layman, who may have difficulty in finding the missing link of an imaginary chain, will be able to understand that there is a distinction between negligently causing an injury and merely creating the occasion upon which the injury was caused by someone else's negligence.

Any attempt to bring consistency into the various parts of the law dealing with wagering contracts is doomed to failure as the legislation on this subject has been piecemeal and unscientific. In *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart*, 43 T. L. R. 278, Mr. Justice Shearman was therefore faced with the problem of choosing, from the logical standpoint, the lesser of two evils. No action is maintainable on a cheque, drawn on an English bank, which has been given in repayment of money lent abroad for gaming purposes, as the cheque must be deemed to have been given for an illegal consideration within section 1 of the Gaming Act, 1835. (*Moulis* v. *Owen*, [1907] 1 K. B. 746.) On the other hand money lent for gaming purposes can be recovered in England if the debt was incurred in a country where such loans are binding. (*Saxby* v. *Fulton*, [1909] 2 K. B. 208.) What is the law where money is lent abroad and a cheque drawn on an English bank is given in payment therefor, and the plaintiff sues for money lent and not on the instrument? In the present case the learned judge held that the plaintiff could recover. This decision seems to be eminently reasonable; to destroy the cause of action on the debt merely because additional security in the form of a negotiable instrument was given would be manifestly unfair and would give rise to obvious difficulties in practice. It is true that this result leaves the law in the peculiar position that the same consideration is deemed illegal for one purpose and legal for another, but this is hardly surprising for, as Sir Frederick Pollock has said in dealing with this branch of the law, 'whatever virtues it may have, [it] has not that of simplicity.' (Principles of Contract, 9th ed. p. 470.)

In *British and North European Bank, Ltd.* v. *Zalzstein*, [1927] 2 K. B. 92, the defence can with all fairness be described as impudent. The manager of the plaintiffs' bank had imprudently allowed the defendant a considerable overdraft. To conceal this from the auditors he credited the defendant's account with a sum sufficient to put it in credit, and subsequently debited it with a similar sum. The net effect of these notional book entries was to leave the defendant's position exactly as it had been. The defendant never knew anything about these transactions for weeks afterwards, but first discovered them when his account was enclosed. At the trial the defendant claimed that (1) the credit was a payment to him which was binding on the bank and (2) that the bank had no authority to make the

subsequent debit. We are surprised that the Court found it necessary to consider the law on this subject at some length. Although there is considerable uncertainty at the present time as to the law on the subject of passbooks (see Halsbury's Laws of England, Vol. I, p. 619), there is no case which makes an entry absolutely binding in all circumstances. Where a customer, in reliance on such an entry, alters his position the same principle which applies to money paid under a mistake of fact is followed. But in the present case the defendant did not know of the credit until it had been cancelled by the debit. It is difficult to see how *Eyles* v. *Ellis*, 4 Bing. 112, and *Skyring* v. *Greenwood*, 4 B. & C. 281, on which the defence relied, are relevant, but if they are, they seem if anything to be authorities favouring the plaintiffs, for in the first case there was a *bona fide* transfer from one account to another and in the second the customer had altered his position in reliance on the credit. If the defendant had succeeded in the present case, the logical result would have been that no bank would ever have been able to correct an error of book-keeping.

In 1909 the New York Court of Appeals in *People* v. *Rochester Railway and Light Co.*, 195 N. Y. 102, considered the question whether a corporation could be indicted for manslaughter under § 193 of the Penal Code. As a similar question has recently been before the Court in this country in *Rex* v. *Cory Brothers and Co., Ltd.*, [1927] W. N. 96, an extract from the American case may be of interest to English readers. Hiscock J., writing for the Court, said: 'Of course, it has been fully recognized that there are many crimes so involving personal malicious intent and acts *ultra vires* that a corporation manifestly could not commit them. But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real or apparent, and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf. . . .

Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death, and amongst which very probably might be included conduct in its substance similar to

that here charged against the respondent. But this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter as now expressly defined in the section alone relied on by the People, and this question we think must be decisively answered in the negative.'

The same principles apply in English law. There is no difficulty in holding a corporation criminally liable for the wrongful acts of its servants (*Griffiths* v. *Studebakers, Ltd.*, [1924] 1 K. B. 102). It is true that this liability is a vicarious liability as 'an artificial person cannot act itself,' but vicarious liability is becoming more frequent in modern criminal law. If a corporation can be held civilly liable for the gross negligence of its servants there is no theoretical difficulty in holding it criminally liable for the same act. It can pay a fine as easily as it can pay damages. The only question in the *Cory Brothers* case, therefore, was whether Parliament had by section 33, subsection 1 of the Criminal Justice Act, 1925, intended to change the substantive law so as to make a corporation criminally liable for the felonies of its servants. Mr. Justice Finlay found that the section was mere machinery and he therefore quashed the indictment. It is obvious that such a radical change in the law would have required clearer wording than the vague suggestion which the prosecution thought the statute contained.

In his judgment the learned judge quoted the well-known words of Lord Denman C.J., in *Reg.* v. *Great North of England Railway Co.*, 9 Q. B. 315, 326, 'a corporation cannot be guilty of treason or of felony . . . of perjury, or offences against the person.' With all respect this statement is apt to be misleading. A corporation, of course, could not itself commit these crimes. But a corporation could be made criminally liable for them if Parliament determined to change the present law by making a corporation vicariously liable for such crimes committed by its servants.

In recent years the law dealing with contracts in restraint of trade has been altered in a number of important particulars. Based as it is to a large extent on current views of public policy it is inevitable that it should be influenced by changes in economic and social theory. *Putsman* v. *Taylor*, [1927] 1 K. B. 637, 741; 96 L. J. K. B. 315, which has had a varied career in the Courts, is not the least important case on this branch of the law. From the legal standpoint the judgments in the Divisional Court are the most valuable, for they deal with the doubtful

question of severability which the Court of Appeal did not find it necessary to consider.

The plaintiff was a tailor carrying on business at A, B and C in Birmingham. He engaged the defendant as manager and cutter at A 'or at such other place or places where the employer's business shall be carried on.' Clause 11 of the contract of employment provided that 'After the determination of this agreement for any cause whatsoever the manager shall not for a period of five years from the date of such determination carry on any business similar to that of the employer or be employed by X, tailors, or be employed in any capacity by any person, firm or company carrying on a business similar to that of the employer in A, or within a half-mile radius of B or C.'

After managing the plaintiff's business at A for fifteen months the defendant left his service and entered that of a rival tailor close by. The plaintiff took proceedings in the county court and prayed an injunction which the judge refused to grant. He held that Clause 11 of the contract must be read as a whole and, as so read, it was in undue restraint of trade. The Divisional Court allowed the appeal on the ground that, without considering the validity of the clause as a whole, it was possible to divide it into a number of separate promises, and, as so divided, the promise not to take service with any tailor in A was valid. The judgments are of particular interest because it is difficult to reconcile them with certain *dicta* in *Attwood* v. *Lamont*, [1920] 3 K. B. 571. That case is usually cited because of its clear rejection of the 'blue pencil' rule, *i.e.*, that a severance can be effected when the part severed can be removed by running a blue pencil through it, and the substitution therefor of the rule that there must be a clear severance by the parties themselves, substantially equivalent to separate covenants. But the judgment of Younger L.J. in that case, in which Atkin L.J. concurred, seems to go further than this, however, and to add another limitation to severability. He quotes Lord Moulton's *dictum* in *Mason* v. *Provident Clothing and Supply Co.*, [1916] 1 A. C. 688 that there ought to be a severance 'only in cases where the excess is of trivial importance, or merely technical,' and then lays down the rule that 'severance where the covenant as a whole is invalid should not in the general case be allowed.' If the Divisional Court had considered itself bound by this principle it is clear that in the present case no severance could have been allowed. It took the view, however, that Younger L.J.'s statement was an *obiter dictum* or else limited by the facts of the particular case, and refused to follow it. Mr. Justice

Talbot said: 'Speaking with great respect, I cannot see how the question whether a contract is severable can be affected by the burthen of proof on the question whether the contract as severed is legal. You have first to see whether there is a severable contract, and, if there is, the plaintiff has then to show that it is legal as not going beyond what is reasonable. The two questions appear to me to be entirely independent.'

When the case reached the Court of Appeal that Court found that Clause 11 as a whole, when properly construed, was not in undue restraint of trade as it was sufficiently limited as regards time and space. It was unnecessary, therefore, to consider the question of severability. The law on this subject thus remains uncertain, for it is doubtful whether Younger L.J.'s statement in *Attwood* v. *Lamont* was not part of the *ratio decidendi*, and whether it can now be treated as a *dictum* which is not binding on the Courts below.

In our present number in the article 'What An Old Reporter Told Me' there is a reference to the creation of the Judicial Committee of the Privy Council (see pp. 358—359 below). The Act of 1833 was drafted by Mr. Craig under the personal direction of Lord Brougham. If the draftsmen could have foreseen the recent decision of *Re Labrador Boundary*, 43 T. L. R. 289, they would have had reason to congratulate themselves on having included section 4 which provides that: 'It shall be lawful for his Majesty to refer to the said judicial committee for hearing or consideration any such other matters whatsoever as his Majesty shall think fit; and such committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid.' Thanks to this provision it was possible to refer to the Judicial Committee the dispute between the Dominion of Canada and the Colony of Newfoundland as to the location of the boundary of Labrador. As Professor J. H. Morgan, K.C., has pointed out in his interesting Rhodes lectures on 'The Judicial Committee of the Privy Council and Unity of Law in the Empire,' in constitutional theory the Crown is one and indivisible throughout the Empire. The result is that no one Colonial Government can sue another, with the curious statutory exception in the case of the Australian States. The Dominion of Canada therefore could not *sue* the Colony of Newfoundland. 'What really happened was that the two Governments agreed to submit the matter in dispute to the Judicial Committee, who, by Order in

Council, were empowered under the Act of 1833 to advise his Majesty on the point in dispute.'

The only legal point of interest involved in the case concerned the meaning of the word 'coast.' The Lord Chancellor in delivering their Lordships' report pointed out that the meaning depended upon the context in which it was used. This is true, of course, of all words which have not been given a statutory interpretation. It seemed curious at first sight to see a reference to Dr. Johnson's dictionary in the report, but the Judicial Committee was construing an 18th century document and it therefore sought, in the first instance, an 18th century definition.

Does the duty of an agent employed to sell land cease when he has procured an offer to purchase which his principal accepts subject to contract? In *Keppel* v. *Wheeler*, [1927] 1 K. B. 577, 96 L. J. K. B. 433, the Court of Appeal has held that, until final contracts of sale have been signed, the agents are still under a duty to inform their principal of any offer they have received at a higher price than the one which has been accepted. If the principal sells at the lower figure the agents are liable in damages for the difference between that sum and the higher offer. The error which the agents made in the present case was a natural one for laymen to make. They believed that the acceptance subject to contract was a binding agreement. It is settled law, however, that an agreement subject to contract is merely a stage in the negotiations (*Chillingworth* v. *Esche*, [1924] 1 Ch. 97). It follows that in these circumstances the agents are still bound to communicate the later offer, for they are under a duty to their principal to obtain as high a price as possible. Whether in strict morals the principal ought in such a case to go back on his acceptance is a question which does not concern the agents. *Fisher* v. *Drewett* (1878), 48 L. J. (Ex.) 32; *Green* v. *Lucas* (1875), 33 L. T. 584, and *Nosotti* v. *Auerbach* (1898), 79 L. T. 413, on which the defendants relied, are not in point, for in those cases the question was whether an agent who had obtained the offer which he was employed to get could recover his commission even though the contract was not completed owing to the default of the principal. In the present case the contract was completed and the only question was whether the agents had fulfilled their duties.

The agents, however, succeeded on their counterclaim for their commission. They had acted in good faith, the transaction

had been completed and the principal had had the benefit of it. As Bankes L.J. said at p. 88: 'It seems to me that an agent might quite properly claim his commission and yet have to pay damages for committing a *bona fide* mistake which amounts to a breach of duty.'

The defence in *James* v. *British and General Insurance Co., Ltd.*, [1927] W. N. 106 must have been a forlorn hope in view of the judgment of Bailhache J. in *Tinline* v. *White Cross Insurance Association, Ltd.*, [1921] 3 K. B. 327. In the latter case the learned judge had held that a policy of insurance, under which the assured was entitled to be indemnified against sums which he should become legally liable to pay to third parties as compensation for 'accidental personal injury' caused through the driving of his motor-car, was not against public policy even though the accident was caused by such gross negligence that the assured had been convicted of manslaughter. The only distinction between that case and the present one was that in the present case the plaintiff was drunk at the time of the collision. The defence was, *inter alia*, that to get drunk was an intentional act and that it therefore came within the *dictum* in *Tinline's Case* that 'It must of course be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff, the policy would not protect him.' But, at most, the intention was only to get drunk; there clearly was no intention to cause the collision, for if there had been the crime would have been murder and not manslaughter. Moreover, if the plaintiff had acted intentionally there would have been no need for the defendant to plead public policy, for an intentional act cannot be called an accident and would not be covered by an accident policy.

The defence in this case illustrates a general attitude to motor offences which we feel is most unfortunate. So much emphasis has recently been put on the drunken driver that magistrates and juries forget that a driver who is sober but who drives recklessly is as great a menace to life. We respectfully agree with Mr. Justice Roche that a drunken driver is not 'any worse morally than people who in their sober senses drive to the danger of the public.'

In *Rex* v. *Editor of the 'Daily Mirror,'* [1927] 1 K. B. 845, 847; 96 L. J. K. B. 352; 43 T. L. R. 254, the Lord Chief Justice said: 'The phrase "contempt of court," as has been observed more than once, is, in relation to the kind of subject-matter with which we are now concerned, a little misleading. The mischief referred to consists, not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person.' On the other hand, in *Rex* v. *Parke*, [1903] 2 K. B. 432, 436, Wills J., in delivering the judgment of the Court, said: 'The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. . . . It is difficult to conceive an apter description of such conduct than is conveyed by the expression "contempt of court."' Although there is much to be said in favour of each of these views we prefer that of the Lord Chief Justice, but, after many centuries of use, it is, of course, too late to change the phrase.

The present case has made it clear that under certain circumstances, as for example where a question of identity is in issue, the publication of the photograph of an accused person may constitute contempt. Police officers are not allowed to show photographs of an accused person to witnesses before the identification parade (*Rex* v. *Goss*, 17 Cr. A. R. 196; *Rex* v. *Dwyer*, [1925] 2 K. B. 799; *Rex* v. *Haslam*, 19 Cr. A. R. 59). It would be equally unfair to the prisoner if the newspapers were to publish pictures which witnesses might see before they were called upon to identify him.

As proceedings against the accused had already begun at the time of the publication of the photograph it was not necessary in the present case to consider the interesting and undecided question whether a contempt can be committed where proceedings are imminent but have not actually commenced. The Lord Chief Justice cited, however, with approval the *dictum* in *Rex* v. *Parke*, [1903] 2 K. B. at p. 437, where Mr. Justice Wills said: 'It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not

possible to do so when the stream has ceased.' Mr. Justice Talbot was doubtful on this point.

The difference between law in action and law in the books is well illustrated by *Grayson* v. *Grayson*, 43 T. L. R. 225. Both the husband and the wife had committed adultery, but Mr. Justice Hill was asked to exercise his discretion in favour of the wife. His Lordship granted a decree *nisi* on the ground that 'One important element now considered was the future of the people, and whether they were likely to marry again or not. The husband was living with a woman, and counsel had said that those two were anxious to marry, and that the husband would never return to his wife, who would not take him back.' Although, as far as the actual words are concerned, the law of divorce in this respect is the same to-day as it was twenty years ago it is clear that at the beginning of the century such a result would have been impossible. But, as his Lordship pointed out, the views of the Court as to the circumstances in which its discretion can be exercised have altered enormously in the last few years. Thanks to this wise development in judicial discretion some of the unfortunate results which might result from a strict administration of the present unsatisfactory law of divorce are avoided.

The general rule of construction that words indicating an existing individual are considered to speak from the date of the will and not from the date of the testator's death does not necessarily apply where the reference is to a person holding an official position. In *In the Estate of Jones*, 43 T. L. R. 324, the testator appointed as executor 'the President of the M. branch of the English Church Union.' Held that the person who was president at the time of the testator's death was entitled to probate.

In his interesting article 'Appeal In English Law,' in the 1927 Cambridge Law Journal, Lord Justice Atkin says: 'Whether the point upon which the appellant relies is a point of law or a point of fact is a very difficult question to settle. I cannot help thinking that very often the answer depends on whether the Court approves of the decision or not. If they do they say that the issue is one of fact, and they ought not to interfere; if they do not approve, they say it is one of law and

they have the right to interfere.' With all respect, we cannot help feeling that some such consideration must have influenced the majority judgments of the Court of Appeal in *Lysaght* v. *Inland Revenue Commissioners*, [1927] 2 K. B. 55, 96 L. J. K. B. 462. The Special Commissioners of Income Tax found that L., who visited England solely for business reasons on 101 days in 1923, 94 days in 1924 and 84 days in 1925, was resident in the United Kingdom for the purposes of an assessment to income tax. Rowlatt J. upheld their decision, but the Court of Appeal (Lawrence L.J. dissenting) allowed the appeal. It is difficult to bring this judgment within the principle laid down by Lord Sterndale M.R. in *Currie* v. *Inland Revenue Commissioners*, [1921] 2 K. B. 332 at p. 336: 'There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession. . . . That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact; and if the Commissioners come to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter.' Unless the Court of Appeal in the present case intended to lay down the rule that under no circumstances could a man be held to be a resident if he were in the United Kingdom for purely business reasons, it is difficult to see why the matter was not a question of degree. Many persons would prefer to live on the Riviera rather than in England if it were not for business reasons. Must they be held to be non-residents?

The judgment of the Judicial Committee of the Privy Council in *Crown Milling Co.* v. *The King*, [1927] A. C. 394, deals with the subject of monopolies, 'a matter of far-reaching economic importance,' as Lord Parker of Waddington said when considering a substantially similar statute in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co., Ltd.*, [1913] A. C. 781. In the latter case the Judicial Committee held that a combination in restraint of trade which, if embodied in a contract, would be unenforceable at common law, was not necessarily 'to the detriment of the public,' and therefore not criminal under the statute. A year later in *North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A. C. at p. 469, Viscount

Haldane L.C. said: 'An ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. . . . It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view.' In the present case the Judicial Committee had to consider, *inter alia*, whether certain flour millers had violated section 5 of the Commercial Trusts Act, 1910, of New Zealand, which makes criminal a conspiracy to monopolize goods 'if such monopoly or control is of such a nature as to be contrary to the public interest.' After reviewing at considerable length the judgments in the Courts below, which showed a marked diversity of opinion, their lordships came to the conclusion 'that the prosecution has not discharged the burden of proof which lies upon it.' As the question was one of fact and not of law it was, perhaps, wise not to give any reasons for this conclusion, but the abrupt ending to the judgment comes as a slight shock.

It has been frequently said that in some of the States of the United States the criminal law is as technical to-day as was the law in England in the eighteenth century, but we believe that it would be difficult to find an English case which could equal *People* v. *Fathers*, 153 N. E. 704, Ill. 1926 (noted in Yale Law Journal XXXVI, 575). The Illinois statute under which the prisoner F. was indicted provided that every male of the age of 17 years and upwards who should have carnal knowledge of any female not his wife under the age of 16 should be guilty of rape. F. was convicted, but on appeal the judgment was reversed on the ground that the indictment did not allege that the prosecutrix E. S. was not the wife of the accused.

That the unsatisfactory administration of the criminal law in the United States is, however, due only in small part to the technicalities of the law is shown by a remarkable report issued in 1926 by a Committee appointed by the Law Association of Philadelphia. In Pennsylvania the procedural law is apparently satisfactory. 'Appeals are not numerous, and reversals are very few. In the six year period from 1917 to 1922, both years inclusive, there were 117 appeals to the Superior Court, in which there were 9 reversals.' This is the most—we might say the only—satisfactory part of the report.

The Committee was handicapped by defective statistics but it

gives some figures. No statement is available of the total number of crimes reported to the police, but ' in 1921 there were 10,206 robberies of all kinds, including larcenies, reported.' There were 4,016 arrests for these crimes and 2,415 prisoners were indicted. Of these, 1,104 either pleaded guilty or were found guilty after trial. In robberies, etc., there is, therefore, about one conviction for every ten crimes reported.

In the 5,086 cases of all indictable crimes brought before the criminal Courts for disposition in 1921 there was the following result:—

Guilty and *nolo contendere*	1310
Tried with verdict of guilty	957
Submitted for verdicts of not guilty	790
Nolle prossed	407
Tried with verdict of not guilty	1548
Trial resulting in disagreement of jury	72
Indictment quashed	2

Out of 5,086 cases there were thus only 2,267 convictions. In the cases of murder, verdicts of guilty were obtained in about 50 per cent. of the cases tried, but apparently there were a considerable number of murders in which no arrests were made. No definite figures are given in the report.

On January 1, 1923, there were 5,640 bills of indictment undisposed of. Of these, 1,417 were more than a year old.

Two other points in the report are worth noting. The ' third degree ' is still used—' The private or secret interrogation of arrested persons prior to indictment, or after indictment and prior to trial, has become common practice.'

Although the judges of the Superior Courts are honest, there is considerable doubt about the magistrates. ' But while ultimate conviction need not be feared by the innocent, there is reason to believe that where prosecutions are instituted to enforce settlement of a civil liability, the accused is sometimes improperly held by the committing magistrate to assist friendly counsel representing the prosecutor. With respect to summary criminal prosecutions, the danger of the unjust conviction of the accused without counsel would seem to be much greater, judging from the number of prisoners discharged from the House of Correction on writs of *habeas corpus*.' (In 1921, 193 writs were issued with the result that 145 prisoners were discharged.)

The committee end on what may seem to an English reader as an unduly optimistic note: ' This comprehensive survey of the criminal administration in the City of Philadelphia shows that generally it is admirable.'

It is interesting to compare with the Philadelphia figures the recently published Criminal Statistics, England and Wales, for the year 1925 (Cmd. 2811, 1927, H.M. Stationery Office). The following table gives the more important facts:—

Indictable offences known to the police	113,986
Persons charged before Courts with indictable offences	59,993
Persons that came for trial before Quarter Sessions or Assizes	8,139
Persons convicted at Quarter Sessions or Assizes	6,639
Persons dealt with summarily (by a Court of summary jurisdiction)	49,404
Persons who pleaded guilty or were found to be guilty	43,944

Thus for 113,986 known offences 50,583 persons were convicted, or 1 conviction for every $2\frac{1}{4}$ crimes. In the only case, *viz.*, robberies, etc., in the Philadelphia report where similar figures are given the proportion is 1 in 10.

The difference between the ratio of persons arrested and convicted is equally striking. In England out of 59,993 persons charged before the Courts 50,583 were convicted, or 5 convictions in every 6 arrests. In Philadelphia there were 4,016 arrests for robberies, etc., and 1,104 convictions, or 1 conviction in every 4 arrests.

'The police do not often bring charges without evidence which is sufficient to convince the Court or which makes it hopeless for the accused to do otherwise than plead guilty,' says the Home Office report.

One other comparison is interesting. In 1921 there were 25,314 arrests for drunkenness in Philadelphia. In 1925 in England and Wales there were only 80,412 arrests for this offence. The figures for Philadelphia with a population in 1920 of 1,823,779 were therefore more than a quarter as large as those for England and Wales with a population of 38,899,000. This result seems to be a doubtful recommendation for prohibition. The English figures are encouraging, for in 1903 the arrests for drunkenness numbered 230,180. A fall of 149,768 cases in 22 years evidences the marked advance in sobriety in the present generation.

A learned Scottish correspondent sends us the following note: In the *Review* for April, at p. 158, the case of *Gifford* v. *Dent*, [1926] W. N. 336, was commented upon. The rubric of the case as given in the current Digest is as follows:—'Demise of ground-floor shop and basement with forecourt projecting into street—Right to space above forecourt *usque ad coelum*—Illuminated sign fixed to outside of house—Trespass.' *Gifford* v. *Dent.* Romer J. [1926] W. N. 336; 71 S. J. 83.

The decision of Mr. Justice Romer was that the lower proprietor had the right to the space above his tenement *usque ad coelum*, and that the upper proprietor had no right to fix a sign to the outside of his house, which projected over this space.

It is interesting to note that the same point has arisen in Scotland, and has been decided differently. In the case of *Urquhart* v. *Melville* (1853), 16 Dunlop 307, it was held that the proprietor of the ground flat could not prevent the proprietor of an upper flat from building a projection, such as a bow window, so long as it did not injure or rest upon the property of the ground flat. The Court held that the maxim *usque ad coelum* did not apply. In the case of *Arrol* v. *Inches* (1887), 14 Rettie 394, a different result was arrived at on the ground that the title of the upper proprietor explicitly excluded him from any right to build over the property of the ground proprietor. The two cases were decided by the same Supreme Court, the Judges in each case being of high repute. Mr. Inglis, senior counsel for defendants in the first case, was head of the Court in the second. The result of the two cases is that the maxim *usque ad coelum* is qualified in Scotland by the law of tenement, which allows the owner of an upper flat to build out a reasonable projection so long as it does not rest on the property of the lower flat, and does it no injury. On the other hand the owner of the lower flat cannot build on the top of his flat, so as to block the windows of the upper flat. The subject is discussed and the two cases referred to in 'Rankine on Land Ownership,' 4th ed. (1909), p. 665. The maxim in question is dealt with in 'Broom's Legal Maxims,' 9th ed., p. 260. It would have been interesting if the Scottish authority had been quoted to Mr. Justice Romer.

T. C. Y.

THE KING'S TITLE AND THE GREAT SEAL.

THE King's title 'George V by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India' was one of the matters considered by the Imperial Conference which met at 10 Downing Street in October and November, 1926.

The establishment of the Irish Free State as a self-governing Dominion with the same constitutional status as the Dominion of Canada in effect repealed the Act of Union (40 Geo. 3, ch. 67) with regard to the twenty-six counties of Ireland which constituted 'Southern Ireland,' under the Government of Ireland Act, 1920; and although the Act of Union still remains in force with regard to the six Northern counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, nevertheless by reason of the dissolution of the Union so far as the rest of Ireland is concerned the words 'United Kingdom of Great Britain and Ireland' had become inappropriate and even misleading.

In these circumstances the Imperial Conference considered it advisable that an alteration should be made in the King's title; and they accordingly recommended that, subject to His Majesty's approval, the necessary legislative action should be taken to secure that his title should henceforward read 'George V by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.'

The Imperial Conference made no recommendation as to the title of the Imperial Parliament; but the proposed alteration in the title of the King necessarily involved an alteration in the title of Parliament. Since 1801 the Finance and Appropriation Acts have commenced with the words 'Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled.' If the words 'United Kingdom of Great Britain and Ireland' were to be omitted from the Royal title it would plainly be necessary to make some change in the Parliamentary title also. Accordingly at the beginning of the present Session the Government introduced 'a Bill to provide for the alteration of the Royal Style and Title and of

the Style of Parliament.' The Bill passed through all its stages in both Houses with little comment and no amendment; and it received the Royal Assent on April 12, 1927.

The first section of the Act provides that 'it shall be lawful for His Majesty . . . to make such alteration in the style and titles at present appertaining to the Crown as to His Majesty may seem fit.' His Majesty was empowered to make such alteration 'by His Royal Proclamation under the Great Seal of the Realm.' Accordingly on May 13 a Royal Proclamation 'under the Great Seal of the Realm' was duly made and published declaring that the Royal Style and Titles should thenceforth be altered as the Imperial Conference had recommended.

The alteration which has thus been made in the King's title, the Proclamation 'under the Great Seal of the Realm' declaring this alteration, and the Act of Parliament empowering the King to make the alteration are all alike worthy of notice, since each has considerable significance in the development of the Constitution.

In former times it was not considered necessary that the King should obtain Parliamentary sanction for the purpose of declaring his title or making any alteration therein. Even in the time of Queen Anne the Act for the Union of the two Kingdoms of England and Scotland (5 Anne, c. 8), while it expressly provided 'that the Ensigns Armorial of the said United Kingdom be such as Her Majesty shall appoint, and the crosses of St. George and St. Andrew be conjoined in such manner as Her Majesty shall think fit,' contained no provision with regard to the Royal title. In those days the King, by and with the advice of his Council no doubt, but without any authorization from Parliament, took such Style and Title as he might think proper.

In an article entitled 'Elizabethan Gleanings' in the English Historical Review for 1900 (cf. Maitland's Collected Papers, vol. 3, p. 157) Maitland pointed out that this prerogative of the Crown must have caused embarrassment to Queen Elizabeth when, on the death of her sister, she ascended the throne. That she should proclaim herself to be 'Queen of England, France and Ireland,' and also 'Defender of the Faith,' was plain enough. But should she also proclaim herself to be 'the Supreme Head in Earth of the Church of England and of Ireland' as her father and her brother had proclaimed themselves to be before her? It was true that the Statute acknow-

ledging Henry VIII 'his Heirs and Successors, Kings of this Realm' to be 'the only Supreme Head of the Church to whom by Holy Scripture all authority and power is wholly given to hear and determine all manner of causes ecclesiastic and to correct vice and sin whatsoever,' had been repealed by the first Parliament of Philip and Mary; but the first Parliament of Elizabeth was about to revive this Act of Henry VIII. If she claimed to be Supreme Head of the Church, it would necessarily involve an immediate and complete breach with the Pope. If on the other hand she did not claim that title, her failure to do so would cause offence to the more zealous Reformers. The difficulty was solved, as Maitland pointed out, by omitting the words 'Supreme Head of the Church' from the Royal Title and substituting for those words the word 'etcetera.' In her Proclamation made immediately after the death of Mary, November 17, 1858, Elizabeth described herself as 'Queen of England, France and Ireland, Defender of the Faith etcetera' and recited that Almighty God had been pleased 'to bestow upon us as the only right heir by blood and lawful succession the crown of the foresaid Kingdom of England France and Ireland with all manner titles and rights thereunto in any wise appertaining.' Thus it was left open to Elizabeth to claim either that she was or was not Supreme Head of the Church on earth, as the exigencies of the political situation might in the future require; and from the time of Elizabeth to that of George III the word 'etcetera' with its ambiguous meaning remained part of the Royal Title.

The Act for the Union of Great Britain and Ireland (40 Geo. 3, c. 67) was the first Act which expressly authorized the King to proclaim his title. The first Article of that Union provided that 'the Kingdoms of Great Britain and Ireland shall upon the 1st January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland, and that the Royal Style and Title appertaining to the Imperial Crown of the said United Kingdom and its Dependencies, and also the Ensigns, Armorial Flags and Banners thereof, shall be such as His Majesty shall be pleased to appoint.'

In accordance with the authority given by the Act of Union a Proclamation was made and published on January 1, 1801, declaring the Royal Title as follows:—In the Latin tongue 'Georgius Tertius Dei Gratia Britanniarum Rex Fidei Defensor'; and in the English tongue 'George the Third by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith.' Thus the claim to the

'Kingdom of France' was finally abandoned and at the same time the use of the ambiguous 'etcetera' was also given up.

Since 1800 the Royal Title has been altered on three occasions, in 1876, in 1901 and in the present year. On each of these occasions the precedent established in 1800 has been followed and Parliamentary sanction has been obtained.

The Royal Titles Act, 1876 (39 Vict. c. 10) authorized Queen Victoria 'with a view to the recognition of the transfer of the Government of India from the East India Company to Her Majesty, to make such addition to the Style and Titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies as to Her Majesty may seem meet'; and the words 'Empress of India' were thereupon added to the Royal Title. Similarly the Royal Titles Act, 1901 (1 Edw. 7, c. 15), authorized King Edward VII "with a view to the recognition of His Majesty's Dominions beyond the Seas' to make a further addition; and thereupon the words 'and of the British Dominions beyond the Seas' were included as part of the Royal Title. And now a third alteration has been made pursuant to the Act of the present Session.

These precedents must be taken to have established conclusively the constitutional doctrine that the King can no longer change his Style and Title without the authority of Parliament, and it is to be observed that the Imperial Conference recognized that legislative action would be necessary in order to carry out the recommendation which they made.

The second section of the recent Act makes provision for the style or title of Parliament. Although the Acts establishing the Irish Free State by necessary implication dissolved, so far as that part of Ireland is concerned, the Union created by Pitt, the Act of Union remains in full force and effect with regard to the six Irish counties which constitute Northern Ireland under the Government of Ireland Act, 1920. Accordingly, the section gives to the Imperial Parliament the title of the 'Parliament of the United Kingdom of Great Britain and Northern Ireland,' and it provides that the present Parliament is to be known as the Thirty-fourth Parliament of the United Kingdom of Great Britain and Northern Ireland, and thereby expressly recognizes that, so far as Northern Ireland is concerned, the Union created by William Pitt has been continuously maintained.

The description of the Great Seal as 'the Great Seal of the Realm' also deserves notice. From the earliest times the Great

Seal has always been used for the purpose of important State documents. It was described by Matthew Paris as the *clavis regni*; and even in the seventeenth century its importance was such that James II, when he fled the country, thought that by throwing the Great Seal into the Thames he would effectively embarrass his successors in the government of the country.

Before the Act of Union with Scotland in 1706 the Great Seal was 'the Great Seal of England,' but Article 24 of the Articles of Union of the two Kingdoms provided that 'from and after the Union' there should be 'one Great Seal for the United Kingdom of Great Britain' and that this new Seal should be different from the Great Seal theretofore used in either Kingdom; and that until the new Great Seal had been made, the Great Seal of England should be used as the Great Seal of the United Kingdom. The Article went on to provide that there should be a Great Seal for Scotland which was to be used for certain documents relating to Scotland, but no provision was made for a Great Seal for England. On the contrary the Article expressly provided that the Great Seal of the United Kingdom should be used not only for sealing Parliamentary Writs and all Treaties with Foreign Princes and States and 'all Public Acts, Instruments and Orders of State which concern the whole United Kingdom,' but also 'in all other matters relating to England as the Great Seal of England is now used.' Thus the Great Seal of England, which had existed from before the Conquest, came to an end, and in its place there was the 'Great Seal of the United Kingdom.'

The Union between Great Britain and Ireland and the consequent alteration in the King's Title necessitated the making of a new Great Seal which then became 'the Great Seal of the United Kingdom of Great Britain and Ireland,' and during the past century the Seal has been so described. The present Act, however, describes it as 'the Great Seal of the Realm.' This change in the description of the Seal is, no doubt, intended to signify that it is the Great Seal not only for the purposes of the United Kingdom of Great Britain and Northern Ireland, but also for the purposes of the whole Empire, or 'the British Commonwealth of Nations,' as some people now prefer to call it.

The Lord Chancellor is the Keeper of the Great Seal and formerly it was considered necessary that he should take the Great Seal with him wherever he went. This, no doubt, was for the purpose of its safety; but in fact its safety was not always thereby secured. In Campbell's life of Lord Eldon (Lives of

the Chancellors, vol. 7, p. 290) the story is told of the loss, fortunately temporary, of the Great Seal when Lord Eldon was residing at his country house at Encombe in Dorsetshire. The house caught fire in the night; the Lord Chancellor, roused from his bed, seized the Great Seal and, rushing out into the garden, buried it. The following morning his lordship, distracted by the events of the previous night, which are fully described by Lord Campbell, was unable to recollect where he had buried the Great Seal, and it was not until a considerable part of the garden had been dug up that it was at last found.

Lord Brougham also lost the Great Seal during his famous progress through Scotland in 1834. He was staying at Rothiemuchus, the residence of the Dowager Duchess of Bedford (Campbell's Lives of the Chancellors, vol. 8, p. 450), and the ladies, who were there, amused themselves by playing a practical joke upon him. They managed to obtain possession of the Great Seal and they hid it in a tea chest.

Nowadays the Great Seal remains secure in its safe at the House of Lords. Even on State occasions when the Chancellor goes in procession with the Purse Bearer before him, carrying the Purse which is supposed to contain the Great Seal, the Purse really is empty and the Seal remains in its safe.

The Imperial Conference, while it recommended an alteration in the English Title of the King, made no recommendation with regard to the Latin Title. The Latin Title is the Title which appears upon the Great Seal and, as everyone knows, upon the coinage. When the Union took place between Great Britain and Ireland the words 'Britanniarum Rex,' 'King of the Britains,' were used to express concisely what in English was expressed by the words 'King of the United Kingdom of Great Britain and Ireland.' When the words 'and of the British Dominions beyond the Seas' were added, this addition was translated somewhat clumsily and—as it might be thought—not very suitably, 'et terrarum transmarinarum quae in ditione sunt Britannica.' Accordingly, the Great Seal made in 1901 bore the title 'Edwardus VII Dei Gratia Britanniarum et terrarum transmarinarum quae in ditione sunt Britannica Rex, Fidei Defensor, Indiae Imperator.' It was obviously impossible to put this lengthy title on the coinage. Thereupon the then Chancellor of the Exchequer, Sir Michael Hicks-Beach, afterwards Lord St. Aldwyn, consulted the distinguished scholar, Sir Richard Jebb, who was one of the Members of Parliament for the University of Cambridge, on the matter and asked him to suggest some abbre-

viation of the title which would be suitable for the purposes of the coinage. Sir Richard Jebb suggested that the three words 'Britanniarum Omnium Rex' (King of all the Britains) should be substituted for the words 'Britanniarum et terrarum transmarinarum quae in ditione sunt Britannica Rex.' This very happy suggestion was adopted and since 1901 there has always appeared upon the coinage 'D. G. Britt. Omn. Rex. F. D. Ind. Imp.' During the course of the debate on the Royal Titles Act, 1927, it was suggested that the Latin Title which appears upon the coinage would be a suitable translation of the English Title recommended by the Imperial Conference. But this suggestion has not been adopted, and the recent Proclamation declares that the King's Title in the Latin tongue is henceforth to be 'Georgius V. Dei Gratia Magnae Britanniae, Hiberniae et terrarum transmarinarum quae in ditione sunt Britannica Rex. Fidei Defensor, Indiae Imperator,' and this is the title which will appear upon the new Great Seal.

MALCOLM M. MACNAGHTEN.

THE CONCEPTION OF USUFRUCT IN CLASSICAL LAW.

IT must have struck any careful reader of books on Roman Law that usufruct, classified as a servitude, is in queer company. On turning to the texts themselves he will discover that Gaius is unaware of the fact that usufruct is a servitude, and that all surviving classical texts, including the long discussion in the Vatican fragments, betray the same ignorance. He will note that even the compilers of Justinian's Institutes sharply mark off usufruct from servitudes, and that the Digest and the Code do the same. The former has a Book 7 on usufruct and the like, and Book 8, which begins with the rubric '*de servitutibus*,' and is concerned wholly with praedial servitudes, while the Code has a title '*de usufructu et habitatione et ministerio servorum*,' and the next title is '*de servitutibus et de aqua*.' There is hardly a hint in the whole of Book 7 of the Digest that usufruct is a servitude, and the few references to *servitudes* in that Book nearly all deal with praedial servitudes, with no suggestion that there is any other kind.[1] It is only from a very specific text of Marcian [2] and a few other scattered texts, most of which have plainly been altered, that we know that there were such things as personal servitudes, and that usufruct was the chief of them. In this state of the texts it is not surprising that doubts have arisen as to the existence of this doctrine in the classical law. The discussion has been mainly in Italy. Longo [3] seems to have shown (subject to a limitation shortly to be mentioned) that the view of usufruct as a servitude is not the classical notion, and Pampaloni has shown changes of rule resulting from the change in conception. It is commonly suggested that the change is due to Justinian, or at least is 'byzantine,' but it seems to be at least equally likely that it crept in towards the end of the classical age. There is no sufficient evidence to show interpolation of the text of Marcian, almost the last of the 'classical' lawyers. But the question at what moment the change came in

[1] D. 7. 1. 15. 7, 16, 19. pr., 27. 4; D. 7. 6. 1. pr., 1. 4, 2, 5. 1. But in D. 7. 4. 27 words which appear to be interpolated treat usufruct as a servitude.
[2] D. 8. 1. 1.
[3] Bull. d'Istituto d. Diritto Romano, XI, pp. 316 *et seq.*

is not for the present purpose material. The fact that both sorts of right were '*iura*' and the similarity of the principal remedies, might have led to such a development at any time. The important point for us is that there was such a change, and the question then arises: What was its nature? How in fact was usufruct conceived in the second century? It is not of course clear that there was one settled doctrine. Gaius doubts what the answer is. A man having become liable to deliver a piece of land, a surety is taken in respect of a usufruct, and the question is raised whether this is valid, as in respect of part of the liability, or void, as for something other than the liability. The text continues '*nobis in eo videtur dubitatio esse ususfructus pars rei sit an proprium quiddam.*'[4] It is true that this text was long ago suspected of interpolation by Faber, and recently by Pampaloni.[5] Their reasons can hardly be the same, since the former had no doubt of its being a servitude in classical law and the latter is quite sure that it was not. Whether it is interpolated or not, it seems to express a doubt very much in point in the time of Gaius, but less so in the time of Tribonian, who, after all, has a clear scheme: usufruct is a servitude.

The relative sections of the Vatican Fragments[6] are full of discussion and controversy. It would seem probable that here, if anywhere, the solution or solutions of the problem may be found, and it is odd that they have received so little attention in this connexion.[7] For Pampaloni[8] the solution is that usufruct is a *pars dominii* which the holder has in a distinct way, and he has no difficulty in showing how change of view led to modification of doctrine. In many of his conclusions he is independently confirming results already obtained almost at the same time by Riccobono. The author's 'Istituzioni,' in which his view and reasoning are set out, is not obtainable in commerce,[9] but a careful resumé of them may be found in an article by Zanzucchi.[1] Some of Pampaloni's results do not seem acceptable. He holds that usufruct, while it is a *pars dominii*, is a *pars* of a peculiar character, capable of co-existing with the rest of *dominium*, so that it can continue side by side

[4] D. 46. 1. 70. 2.
[5] Arch. Giur. 55, p. 513.
[6] Vat. Fr. 41-93.
[7] Sokolowski, in his 'Philosophie im Civilrecht,' in which he seeks to explore the minds of the jurists and the philosophic bases of their doctrines, does not, in his index of texts, give any reference to the Vatican Fragments, full of discussion as they are. The present question he does not discuss.
[8] Bull. 1910, pp. 109 *et seq.*
[9] I have to thank the distinguished author for sending me a copy.
[1] Zeits. d. Sav. Stiftung, R. A. 1909, pp. 509 *et seq.*

with the other parts in the same hands. It is of course obvious that the right of ownership includes the rights which constitute usufruct. Many of the texts cited by the author show no more than this, coupled with the fact that the classical writers had not reached a clear conception of the nature of usufruct. Such are the many texts which consider whether usufruct is a *pars dominii*,[2]—those which consider whether a *dominus* can give a hypothec over a usufruct,[3] and one which says that where one of common owners leaves the usufruct to his wife, she has a part of the usufruct over all the property, and it is not in the power of the iudex in *communi dividundo* to give her all the usufruct in half of the property.[4] Other texts say that, if usufruct of part is given to a non-owner, the owner has the rest of the usufruct.[5] From these texts, and a number of others expressing the same idea, the author infers that if of two usufructuaries one acquires the *proprietas*, so that the usufruct is '*consolidatus apud eum*,' the usufruct continues its separate existence in the hands of the owner. Apart from texts which the author holds to have been altered, his main supports for this part of his thesis seem to be D. 7. 1. 57. pr. and D. 38. 2. 35, of which he says that the first expressly states his theory and the other does not contradict it.[6] The texts are simple, and they seem expressly to contradict his doctrine. In the first we are told that the *dominus* made the usufructuary his *heres*. The will was upset by the *querela*. The usufruct still exists. It is hard to see how this can be supposed to express the notion that after *consolidatio* the usufruct continues to exist as a separate entity in the hands of the *dominus*. The effect of the *querela* is to avoid the will altogether. There is no will: there has been no *consolidatio*, and the usufruct is of course unaffected. In the other text on similar facts the will is upset by *bonorum possessio contra tabulas*, and Javolenus says '*usumfructum in causam pristinam restituendum puto*.' The difference is plain. Here, notwithstanding the *bonorum possessio contra tabulas*, the will is civilly valid. The usufruct is thus *consolidatus*, and there is no resource but *restitutio in integrum*. These texts seem explicitly to negative the author's view. In view of this it is scarcely necessary to go through the texts which negative his view, but are altered by the author so as to make them conform.

[2] See, *e.g.*, Roby, *De Usufructu*, p. 42.
[3] P. 113; *e.g.*, D. 20. 1. 15. pr.; D. h. t. 11. 2, in both of which texts the material parts have been suspected of interpolation.
[4] P. 114; D. 33. 2. 31.
[5] P. 115; D. 7. 2. 3. 2. 4, 9.
[6] P. 133.

But it is worth while to advert to one case, because the text is independent of Justinian. If a 'consolidated' usufruct continues to exist, it is not lost. But in P. Sent. 3. 6. 28, we read:

'*Usufructus amissus ad proprietatem recurrit. Amittitur autem quinque modis: capitis minutione, rei permutatione, non utendo, iniure cessione, dominii comparatione.*'

On this Pampaloni [7] observes that the five cases stated do not exhaust the modes of *amissio*: they omit death and expiry of term. This wrong use of *amissio* betrays alteration, and, so he holds, the words were really not '*amissio*,' '*amittitur*,' but '*consolidatus*,' '*consolidatur*.' The method is drastic, and, of course, effective. But the change is not justified. While '*amissio*' is not uncommonly used to denote any expiry of the usufruct,[8] it is here used as commonly in the Vatican Fragments [9] to denote what may be called premature determination of the usufruct. It is after all a little absurd to say of a man who dies that he loses the usufruct. Another pre-Justinian text which the author does not appear to discuss in this connexion is Vat. Fr. 83. Here a joint usufruct is *consolidatus* in the hand of one of the fructuaries. We are told that the *dominus* has not lost his *ius accrescendi*. This, of course, expresses the well-known principle that accrual in usufruct is to the person and not to the share, and one who has lost his share is not debarred from claiming accrual in a share which falls in. But it adds that the other has lost his right of accrual at civil law, and if something happens which would have involved *amissio ususfructus* in the *dominus* had there been no *consolidatio*, there is in strictness no accrual, and the usufructuary has only an *actio utilis*. This can mean only that the usufruct which is *consolidatus* has ceased to exist.[1] In D. 7. 4. 17 Julian appears as saying that if a man leaves to you a simple legacy of usufruct, and to Titius a conditional legacy of the *proprietas*, and you acquire the *proprietas*, *pendente condicione*, and then the condition occurs, '*pleno iure fundum Titius habebit neque interest quod detracto usufructu proprietas legata sit: (tu) enim dum proprietatem adquiris ius omne legati ususfructus amisisti.*' This text of Julian, whom we shall find later expressing similar views, states in a startling form the total disappearance of the usufruct. Pampaloni alters the words [2] quoted to make them

[7] P. 130.
[8] See, *e.g.*, C. 3. 33. 14. 1: '*illo moriente vel aliis legitimis modis eum amittente*'; cf. D. 7. 4. 5. *pr.*
[9] *E.g.* Vat. Fr. 76.
[1] The point is lost in the reproduction in the Digest, 7. 2 3 2.
[2] P. 131.

read '*fundum Titius habebit detracto usufructu, neque enim dum proprietatem adquiris ius omne legati amisisti.*' But why did they make this extraordinary change? As an expression of a rigid civil doctrine it is admissible: as a reform on equitable lines it is unintelligible.[3] In a text which the author mentions,[4] but not in this immediate connexion, we are told that where the *proprietas* is left to the *heres*, and the usufruct to A B and the *heres*, the third of the *heres* '*proprietate miscebitur*,' an odd expression if the usufruct still maintains an independent existence. This is significant since the text goes on to say that in certain events the *heres* will have half the property and half the usufruct. The earlier part shows that this does not mean a right distinct from his ownership. The next text[5] says that if the *heres* sells his share '*deducto usufructu*,' he does not lose his *ius accrescendi*: '*nihilominus putat Iulianus adcrescere, nec videri novum tibi adquiri usumfructum.*' This seems in favour of Pampaloni's view, for if it is not a new usufruct the old one must still have been existing, or so it seems, but the author does not cite it. And since the author quoted (Julian) is the writer of the last two texts, it seems safe to infer that it is his view that the usufruct revives. It is the fact that, though the usufruct has ceased to exist, there is still a possibility of accrual, which leads to this sort of language.

Pampaloni considers the word 'consolidation' to express survival. In fact it seems merely to express the fact that usufruct is a *pars dominii*, and the parts have come together; but the word occurs so rarely that its precise limit or meaning can hardly be shown.[6] It is, however, to be observed that *consolidatio* is never said of praedial servitudes: one can consolidate parts of the same thing, but not two things of different character. Conversely, it is probable that the few cases in which '*confusio*' is said of property and usufruct are due to interpolation.[7] On the same principle we are told that usufruct can be reserved in a *mancipatio*, by *deductio*,[8] and it is clear that this could not be done in classical times by *traditio*,[9] but that by the time of Justinian this mode of conveyance had

[3] See also Venuleius, D. 7. 9. 4: '*Si fructuarius proprietatem adsecutus fuerit, desinit quidem ususfructus ad eum pertinere propter confusionem*,'' where the last two words are probably an addition. See also D. 33. 2. 26 *m.*

[4] P. 115; D. 7. 2. 4.

[5] D. 7. 2. 5.

[6] According to the *Vocabularium*, the only juristic texts which have it are D. 7. 2. 3. 2=Vat. Fr. 83; D. 7. 2. 6. pr.; D. 23. 3. 78. 2.

[7] *E.g.* D. 7. 4. 27; 7. 9. 4. Pampaloni, p. 129. Cf. D. 7. 8. 14. 2; 40. 4. 6.

[8] Vat. Fr. 47, 50, etc.

[9] Vat. Fr. 47a.

become available for the purpose. It is also clear that even in classical times, when usufruct was not a servitude, there was a close analogy between usufruct and servitudes, which is not inconsistent with a fundamental distinction between them.[2] They were in fact different species of the genus '*ius*.' It is easy to assume, and the assumption is commonly made, that this *deductio* was equally applicable to such things as rights of way. But this seems to be an error. It is clear that, at least for some purposes, usufruct was a *pars dominii*, not in the sense of a separate, or even an undivided, part of the thing, but a part of the rights involved in ownership, extending indeed over the whole thing.[3] It is clear that some such notion as this is needed to make the idea of *deductio* applicable. One cannot deduct what is not a part. A praedial servitude is not a part for this or any other purpose: it is indeed expressly contrasted with usufruct from this point of view.[4] The point is illustrated by well-known rules as to non-disclosure on sale. An outstanding usufruct not notified to the buyer gave rise to a claim for *evictio partis*, but, apart from warranty or *dolus*, an outstanding undisclosed praedial servitude gave no right of action at all.[5] Consequently, no text ever speaks of *deductio* in relation to praedial servitudes. This is not a mere accident, due to the fact that we have in the Vatican Fragments a detailed discussion of usufruct, while we have no such thing for praedial servitudes. Classical evidence is no doubt the best, but the Digest counts for something. It tells us of *deductio ususfructus*,[6] but never of *deductio iuris itineris*, or the like, and, land being a *res mancipi*, we should have expected this. Such reservations took the form of '*leges mancipii*,' embodied, like *deductio*, in the transaction itself. Gaius says: '*Duorum praediorum dominus, si alterum ea lege tibi dederit ut id praedium quod datur serviat ei quod ipse retinet, iure impositus servitus intellegitur.*'[7] Ulpian says: '*Si quis duas aedes habeat et alteras tradat potest legem traditioni dicere, ut vel istae quae non traduntur servae sint his quae traduntur . . . idem erit et in praediis rusticis.*'[8] Girard[9] notes that these texts must have referred to *mancipatio*, and holds that in the original they spoke of *deductio*. But there is no

[2] See, *e.g.*, G. 2. 31; 4. 3; Vat. Fr. 45, 68, etc.
[3] Vat. Fr. 80, in fin.
[4] D. 31. 76. 2; D. 50. 16. 25.
[5] D. 18. 1. 19; h. t. 66.
[6] *E.g.* D. 7. 1. 6; 19. 1. 7; 38. 2. 35.
[7] D. 8. 4. 3.
[8] D. 8. 4. 6. *pr.* In D. 8. 3. 33. pr. (Afr.) it is '*dictum*.'
[9] Manuel (7), 393. The distinguished scholar's lamented death occurred after this article was written.

evidence for this, and it is not easy to see why the compilers should have made such a change, since in their time *deductio* had long been admissible in *traditio*. The '*legem dicere ut serviat*,' which appears substantially in both texts, expresses the view of *servitus* as a burden, which is also expressed in texts from the classical age.[1] M. Girard's attitude seems to be due to his just rejection of the view that *leges mancipii* could be utilized so as to embody ancillary obligations in the transaction itself. But the particular reservations mentioned in these texts are precisely such as would be admissible on his view. They define what passes. Usufruct could be deducted and consolidated because it was a part. Praedial servitudes could not, because they were not parts, but burdens. The practical difference is nothing: it is a difference of terminology forced on the jurists by the difference in conception of the two institutions.

This change in the conception of usufruct from a *ius* which is a *pars dominii* to a servitude is shown by Pampaloni to account for many of the conflicts in the texts, and to justify many allegations of interpolation. But it does not go far in itself towards explaining the special rules which applied to usufruct in the classical law. The right basis, the position from which the right view of the classical institution is to be taken, seems to have been laid down by Riccobono in his Istituzioni, already mentioned.[2] Starting from the words '*salva rerum substantia*,'[3] he defines usufruct for classical law as '*il diritto di usare e godere delle cose aliene salva la sostanza*,' *i.e.* '*senza attingere, esclusa, la sostanza.*' This he explains further as meaning that the fructuary acquires the right to appropriate the fruits of the thing, but has no power over the thing itself[4]: '*Il suo diritto si limita alla species rei, cioe alla forma, alla figura esteriore da cui depende la produzione dei frutti, non investe la substantia, cioè l'essenza della cosa.*' Thus '*salva*' means '*sauf*,' 'save,' exclusive of the substance.[5] The same idea is elsewhere expressed perhaps more simply and clearly[6]: '*Il diritto alla percezione dei frutti fu concepito dalla dottrina Romana come un diritto a se independente da qualsiasi relazione giuridica con la*

[1] A right of way is something which '*debetur*': Bruns, Fontes, (7) 1, p. 340. In D. 8. 6. 11, 14, 16, etc., the servitude which '*debetur*' is already in existence. In D. 8. 4. 5, 6. 1, where '*deducere*' would have been apt if it were applicable, the words used are '*iniungere*,' '*imponere*.'

[2] *Ante*, p. 327.

[3] D. 7. 1. 1; Inst. 2. 4. pr.

[4] P. 379.

[5] *Ibid.*

[6] P. 392.

cosa.'[7] It is for classical law a *pars dominii*, but not a *pars rei*, and this leads the author to reject, as interpolated,[8] a statement attributed to Celsus that usufruct is a *ius in corpore*,[9] and one attributed to Gaius that it is a *ius fundi*.[1]

Whether we accept or reject the translation of '*salva rerum substantia*,' the conception of usufruct which results from it, but does not in any way depend on it, is used by Riccobono (in conjunction with the alimentary purpose of the institution), as it seems very successfully, to explain a number of the classical rules affecting it. Its alimentary purpose is used to explain the rule '*sine persona consistere non potest*,'[2] with the corollary that a legacy of usufruct cedes only on *aditio*,[3] the fact that it can exist only over what is capable of rendering a utility,[4] the difficulty of admitting usufruct in favour of juristic persons,[5] and the rule, gradually relaxed, that the usufructuary's enjoyment must be measured on that of the person from whom it came.[6] To these points we shall recur; for the present it is enough to say that if the alimentary purpose had played so large a part we should have expected that, like *habitatio*[7] usufruct would not be lost by *capitis deminutio*, and that it seems possible to find a more fundamental basis for most of these rules.

The fact that usufructuary has no right in the *res* itself is used to explain the absence of *possessio*,[8] and of such remedies as the Aquilian action,[9] *operis novi nuntiatio*,[1] *aquae pluviae arcendae*,[2] and so forth, and the fact that fruits are acquired only by *perceptio*.[3] With the relaxation of some of these rules in later law we need not concern ourselves. From the principle that the right is only in the *forma* come the rules that the fructuary cannot alter this,[4] and that the usufruct ends if this is changed,[5] and that he has no right to visible additions to the *res*.[6] As he

[7] See also Riccobono, Mélanges Cornil, 2, p. 304.
[8] Inst. p. 387.
[9] D. 7. 1. 2.
[1] D. 46. 1. 70. 2.
[2] Vat. Fr. 55.
[3] Vat. Fr. 60.
[4] D. 7. 1. 41.
[5] D. 7. 1. 56.
[6] See, as to this, apart from the Istituzioni, Riccobono, Studi Brugi, pp. 173. *et seq.*
[7] D. 7. 8. 10. pr.
[8] G. 2. 93.
[9] D. 9. 2. 11. 10 and 12.
[1] D. 39. 1. 1. 20.
[2] D. 39. 3. 3. 4.
[3] Inst. 2. 1. 36.
[4] P. Sent. 3. 6. 21.
[5] P. Sent. 3. 6. 28 *et seq.* Cf. D. 7. 1. 53; 7. 4. 10. 4.
[6] D. 7. 1. 9. 4, *insula nata*.

has in no way the juridical representation of the thing, he cannot in classical law create or destroy or vindicate a servitude affecting it.[7] The principle also explains the limits on a fructuary's acquisitions through the slave, and the fact that he is noxally entitled and not liable.[8] It is because the right is to enjoy the fruits that there can be no *fructus* without *usus*: fruits cannot be got without cultivation.[9] Riccobono [1] adds that the conflicting statements on the question whether it is a *pars* or not, and, indeed, of what it is a *pars, rei or dominii*,[2] show that it was hard to find a juridical category for usufruct.

The list of rules studied by Riccobono does not exhaust the peculiarities of usufruct, and the rule that it accrues '*personae non portioni*,'[3] and the difficulty in admitting usufruct in juristic persons,[4] hardly seem adequately explained by the 'alimentary' origin of the institution. There is also the exceptional rule that a legacy of usufruct *ex die* does not cede till the *dies*.[6] There is the curious rule that there is accrual after enjoyment has begun.[7] And there are a number of phrases in which the special character of usufruct is considered, and sometimes used to explain the rule under discussion: 'Quamquam enim ususfructus ex fruendo consistat id est facto aliquo eius qui fruitur vel utitur, tamen ei semel cedit dies.'[8] 'Tunc constituitur ususfructus cum quis iam frui potest.'[9] 'Ut Celsus et Iulianus eleganter aiunt, ususfructus cotidie constituitur et legatur, non, ut proprietas, eo solo tempore quo vindicatur.'[1] And there is the remarkable passage: 'Quamquam Sabinus responderit, ut et Celsus libro XVIII digestorum refert, eum qui pertem ususfructus in iure cessit et amittere partem et ipso momento recipere, quam sententiam ipse ut stolidam reprehendit: etenim esse incogitabile eandem esse causam et amittendi et recipiendi.'[2]

There is throughout the discussion in the Vatican Fragments continual evidence of disputation on points of importance. It is

[7] D. 7. 1. 15. 7; D. 7. 6. 5. 1.
[8] D. 9. 4. 18.
[9] P. Sent. 3. 6. 24.
[1] P. 394.
[2] *E.g.* D. 7. 1. 4; D. 46. 1. 70. 2; D. 50. 26. 25.
[3] D. 7. 2. 10, etc.
[4] D. 7. 1. 56.
[6] D. 7. 3. 1. 3; D. 36. 2. 5. 1.
[7] Vat. Fr. 77. There are many difficult questions in the law of accrual in usufruct, but they are beyond the scope of this paper.
[8] Vat. Fr. 59; D. 7. 3. 1. pr.
[9] Vat. Fr. 60; D. 7. 3. 1. 2.
[1] Vat. Fr. 77; D. 7. 2. 1. 3.
[2] Vat. Fr. 75 in fin.

clear enough that, as Riccobono says, there was great difficulty in arriving at the proper conception of usufruct, and here, as in other places, Julian seems to have been the chief agent in settling the thorny questions.

Usufruct was a *ius*, a '*merum ius*,' having no juridical relation to the physical thing, differing in this respect from praedial servitudes, which were essentially attached to *praedia*. It was for the jurists to say what consequences followed from this conception. A right cannot exist wholly, so to speak, in the air. If it has no relation to a physical thing, it must be in relation to a person to whom it can immediately attach as a right. It is attached to the personality in a way in which such a right as *dominium* is not, nor a praedial servitude (though this, too, is a '*ius*'), for these have also a point of attachment to a physical thing. '*Personae non praedii est.*'[3] Accordingly it does not exist at all, unless there is a person to whom it attaches, and ceases if the *persona* ceases, while, on what seems the better view,[4] a praedial servitude is not affected by the abandonment of either *praedium*[5]: it is an accessory or burden on the land. It was for this reason that there was difficulty in admitting a usufruct in 'juristic persons,'[6] for the classical lawyers, though admitting rights in corporate bodies and the like, hesitated to call them 'persons.'[7] *Persona*, in fact is not for them a term of art: it means a human being.[8] It is for this reason that usufruct '*accrescit personae non portioni*,'[9] so that the fact that one had lost his share did not debar him from claiming in respect of an accrual. It is for this reason that the fructuary acquires fruits only on *perceptio*.[1] The fruits are not his *ius*, and, as his *ius* is in no physical relation with the *res*, his acquisition involves his getting into such a relation, by something analogous, but only analogous, to a *traditio*.[2] It is the fact that the right has no

[3] D. 7. 1. 32.
[4] Fadda, Studi Serafini, p. 67=Studi, I, p. 211.
[5] The matter is, however, disputed: see, *e.g.*, Pampaloni, cit. p. 119. But a usufruct could certainly exist where there was no ownership, *e.g.*, where a *servus fructuarius* was freed by *dominus*: Fr. Dos. 11; Ulp. 1. 19.
[6] D. 7. 1. 56.
[7] See G. 2. 11: the property of a *universitas* is *nullius in bonis*.
[8] See Buckland, Slavery, p. 3.
[9] D. 7. 2. 10, etc.
[1] Inst. 2. 1. 36.
[2] Pampaloni, indeed (op. cit. 135 *et seq.*), holds that in classical law he took by *separatio*. Apart from texts which he alters, his case rests on (1) the fact that usufructuary acquires *fetus* by their birth (D. 22. 1. 28=Inst. 2. 1. 37), but comparison of this with Inst. 2. 1. 36 shows that a distinction is drawn between these and ordinary *fructus*, these being his '*statim pleno iure*'; as they come into existence with no act, *separatio* is the same as *perceptio*; (2) D. 22. 1. 25. 1. The text, which deals with *b. f. possessor*, speaks throughout of

existence at all till it is connected up with a person, as his right, which accounts for the wholly exceptional rule that a legacy of usufruct *ex die* does not 'cede' till the arrival of the day,[3] and also for the rule that though usufruct is ended by *capitis deminutio*, it is not affected by one which happens before *dies cedit*, or, as it is put, before the right '*constituitur*'—'*hodie enim incipit.*'[4] It is all the more remarkable that where the legacy is *per damnationem*, the right to claim the usufruct—the '*actio*'—is destroyed by *capitis deminutio* after *dies cedit*, the point being apparently that there is from that moment a right, not, indeed, a usufruct, but an enforceable right to have one created, sufficient to bring it into connexion with the person.[5] There seems to have been no dispute about this ('*constat*'), and in another text Paul lays it down that the '*actio*' is lost by the same events which will destroy a usufruct, except non-use.[6] It is not therefore the completeness of the right which is in question, but the existence of a person to whom it can then and there be attached. It will be noted that it is this fact, that a *capitis deminutio* before *dies cedens* does not affect the usufruct, which renders possible the '*repetitio*' of the usufruct, *i.e.* the grant of successive usufructs to take effect from *capitis deminutio*.[7] It is on the same principle that if action is brought before the *dies*, where the gift is *ex die*, the action brought is lost, but the right is not—*nil facit*,[8] a rule which is elsewhere applied only to conditional rights, and there with differences of opinion, which may, however, be due to interpolation.[9]

All this may be called the settled classical doctrine, but it is clear that it dates only from the second century. Even so fundamental a question as that of *dies cedens* in a legacy of usufruct was not settled till then. Labeo made it cede, like other legacies, at the death—'*sed est verior Iuliani sententia.*'[1] And the curious immateriality of usufruct as then conceived still left room for differences of opinion. We have already seen side by side what are really divergent views. According to one, that of

perceptio, and does not mention fructuary except in what P. regards as an addition. In fact, the mode of acquisition is immaterial to the case.

[3] D. 7. 3. 1. 3, etc.
[4] Vat. Fr. 60, 62.
[5] Vat. Fr. 61.
[6] Vat. Fr. 46.
[7] Vat. Fr. 64.
[8] D. 7. 3. 7. 4.
[9] G. 4. 53; P. Sent. 1. 10. 1; Inst. 4. 6. 33.
[1] Vat. Fr. 60. It may be noted that, according to D. 33. 2. 7, a legacy of the analogous right of *operae servorum* did not cede till it was demanded. Another rather obscure text says what is taken to mean that it cedes on death: D. 33. 2. 2. See Girard, *Man.* (7), p. 388.

Julian, the usufruct exists only when '*quis iam frui potest.*'[2] But in the adjoining text we are told that '*ex fruendo consistit, id est facto aliquo eius qui fruitur et utitur.*'[3] On the face of it this is a different view: there is no usufruct till it is actually enjoyed. So, too, we are told, with the same implication, that '*ususfructus cotidie constituitur et legatur, non ut proprietas eo solo tempore quo vindicatur.*'[4] The words '*id est . . . utitur*' may be an ancient[5] gloss; the order of the verbs is unusual, and '*fruendo*' does not necessarily mean enjoying. Elsewhere '*uti*' is used to mean having the right.[6] And this doctrine requiring actual enjoyment is set down to Julian, who is also the authority for the other view. But however we father these doctrines, there are two, and legal inferences are drawn from them both.

This immaterial, non-physical conception of usufruct suggests a question as to the meaning of the expressions '*possessio iuris*,' '*ius possidere*,' '*iuris possessor.*' If the usufruct has no relation to any physical thing, '*possessio iuris*' ought to mean some relation to the right itself, not concerned with the physical thing. In other words, it should not mean actual enjoyment. In fact '*ius possidere*' ought to mean the same as '*ius habere*,' subject to the consideration that the expression might seem to be more fitly used where the title to the *ius* is praetorian and not civil. There are texts which seem to take this line. Thus we are told '*si tamen hac lege comparavit seu quocunque legitimo modo sibi hoc ius acquisivit, tuendum esse eum qui hoc ius possedit.*'[7] The text is concerned with a real action where the complete creation of the right is alone in question. So, too, '*habere precario videtur qui possessionem corporis vel iuris adeptus est ex hoc solummodo causa quod preces adhibuit et impetravit ut sibi possidere aut uti liceat.*'[8] Here, too, it is the acquisition that is in question: it does not seem that there must have been an act of enjoyment. But the matter is complicated by the fact that a common way of creating these rights was by allowing enjoyment, *patientia*.[9] It is, however, clear that in most of the

[2] Vat. Fr. 60; see also Vat. Fr. 62.

[3] Vat. Fr. 59. As we know, '*in iure consistit*'; hence it cedes on the day when first it became possible to enjoy it. On the view that it existed only by virtue of enjoyment, *ex facto*, we should have expected the rule reached, after discussion, in *legatum operarum*, that it ceded only on demand: D. 33. 2. 7. Cf. D. 7. 7. 1.

[4] Vat. Fr. 77.

[5] The words are also in the Digest: D. 7. 3. 1. pr. But it would not be the only corruption appearing in both texts: Vat. Fr. 78; D. 7. 2. 1. 4.

[6] Vat. Fr. 75. 3; D. 7. 2. 1. 3.

[7] D. 8. 4. 2.

[8] D. 43. 26. 2. 3.

[9] See also D. 7. 6. 3. M. Cornil, to whose kindness I owe most of these and many other references, calls attention to D. 43. 16. 3. 17, which tells us that the

texts, and not only in connexion with Interdicts, *possessio iuris* means actual enjoyment of the right, and is not to be distinguished from *quasi possessio*. Even in relation to this expression it is not always clear whether it means 'something like possession' of the thing, or 'something like possession' of the *ius*. In some cases it is clearly the latter.[1] But we need not consider this, or the question whether the expression is classical. What concerns us is the suggestion, of which we shall have traces later, that in early classical law *possessio iuris* did not necessarily refer to actual enjoyment.[2]

In relation to legacy we have an interesting trace of the altering conception of usufruct. The point discussed [3] is how the *l. Falcidia* is to be applied to a legacy of usufruct. The '*veteres*,' which here must mean the lawyers of the Augustan age, held that the usufruct must be valued, and a deduction made, if necessary, on that valuation. But Aristo, '*a veterum opinione discessit*,' and held that the matter could be dealt with by keeping back so much of the usufruct as would be kept out of a legacy of the physical thing. The older opinion takes a very abstract point of view. It is impossible to detach part of a '*merum ius*,' just as we are told elsewhere that a man cannot conceivably be forcibly expelled from a '*merum ius*.'[4] It was not till the time of Aristo, who lived well into the second century, that the common-sense view was taken, that if so much was kept back as would have been kept back in an ordinary legacy, the desired effect would be produced in a more convenient way.

This non-physical conception also explains another rule due to Julian, which does not seem to have attracted attention in this connexion, or much in any connexion. According to the sources, *res hereditariae* cannot in the ordinary way be the subject of *furtum*, and the impossibility of *furtum* lasts, not merely to the entry of the *heres*, but till he has actually taken possession of the thing in question.[5] Gaius goes into detail, and explains

interdict *de vi* is available to one who '*ususfructus nomine fuit quasi in possessione*.' This is of the *res*, for it is '*ususfructus nomine*.' But that makes the '*quasi*' redundant, for '*in possessione*' expresses the same idea.

[1] D. 4. 6. 23. 2; D. 8. 5. 10. pr.

[2] Professor Riccobono has kindly drawn my attention to D. 2. 8. 15 1. A '*possessor*' of land did not give security in a case of appeal. The fructuary is not *possessor* for this purpose—the *proprietarius* is. Yet *uxor* is *possessor* of *res dotales* (*h. l.* 3), though her right is obviously deferred. But it is not a *merum ius*, like that of fructuary.

[3] Vat. Fr. 68; D. 35. 2. 1. 9.

[4] D. 41. 3. 4. 26; cf. D. 33. 2. 1. A praedial servitude is '*neque ex bonis neque extra bona*.'

[5] G. 2. 52 *et seq.*; 3. 201; D. 47. 2. 69 (Marcellus); D. 47. 19. 2 (Ulpian).

that [6] the old *usucapio lucrativa pro herede*, in exact accordance, applied also, notwithstanding entry, till the *heres* had taken possession, and also that neither rule applied where there was a *heres necessarius*, and thus no question of entry.[7] The requirement of actual possession, making theft an inroad on possession, can hardly have been part of the original conception.[8] The point is not taken with respect to *necessarii*, a difficulty which has been explained by supposing the exclusion of *usucapio lucrativa* to have existed at first only where there were *sui*, with the further assumption that where these existed their *condominium* involved also an implied possession. Indeed, the main text,[9] which tells us that a *heres* does not possess until he has actually taken possession, gives the reason that the *heres* receives only what the *hereditas* contained, and it did not possess, a reasoning that applies only where there is a *hereditas iacens*. But no text hints that the rule that a *heres* does not possess till he has taken possession is not applicable to *sui*, and this piled-up hypothesis is not very acceptable. The requirement of possession is of course not necessary for the purposes for which, according to Gaius, the rule about *usucapio lucrativa* was introduced,[1] though little importance attaches to this historical speculation. But there is other evidence of relatively late origin of the requirement. The *crimen expilatae hereditatis* is late, and it is available till the *heres* has taken possession.[2] The edict dealing with theft or *damnum* by a slave freed by the will is older: it is discussed by Labeo.[3] It applies only if the act is done before entry,[4] and Labeo accounts for the edict on the ground that till entry the rule about *res hereditariae* applies. This, and not possession, is for him the decisive point. That Ulpian cites Cervidius Scaevola, as saying that there is no *furtum* till the *heres* has possession,[5] also indicates lateness, and M. Huvelin was no doubt right in asserting this late origin.[6]

A well-known group of texts discusses exceptions to the rule:—

Marcellus[7]: Hereditariarum rerum furtum fieri Iulianus negabat nisi forte pignori dederat defunctus aut commodaverat,

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[6] G. 2. 52.
[7] G. 2. 58; 3. 201.
[8] The necessity of the *actio ac rationibus distrahendis* where a *tutor* made away with property of his ward is not due to the fact that *tutor* is in possession but to the fact that in primitive times the child was not thought of as owner till he came '*in suam tutelam*.'
[9] D. 47. 4. 1. 15, Ulp. quoting Scaevola.
[1] G. 2. 55. See Cicero, *de legg.* 2. 19. 48.
[2] D. 47. 19. 2. 1.
[3] D. 47. 4. 1. 1.
[4] H. t. Rubr., 1. 8, etc. See Lenel, E. P. (2), p. 322.
[5] 47. 4. 1. 15.
[6] *Furtum*, 1, pp. 677 *et seq.*
[7] D. 47. 2. 69-71.

Scaevola: aut in qua usufructus alienus est.

Marcellus: His enim casibus putabat hereditariarum rerum furtum fieri et usucapionem impediri: idcircoque heredi quoque actionem furti competere posse.

The only points to be noted are that it is not a question of legal *possessio*, but of physical detention, since a commodatary does not possess, and the *heres* cannot be held to possess till he has in some way adopted the contract or claimed the *res*. Though Julian is here, too, the main authority, the form of the texts is such that we cannot be sure that we have here any view of his in relation to usufruct. For this we must look at another text.[8]

'Iulianus: Si homo cuius usufructus legatus erat ab herede numquam possessus subreptus fuisset, quaesitum est, quia heres actio furti non haberet, an usucapi possit. Sabinus respondit nullam eius rei usucapionem esse cuius nomine furti agi possit: agere autem furti eum qui frui deberet posse, quod si (c) accipiendum est ut fructuarius poterit uti, aliter enim homo in causa non perduceretur, sed si utenti iam et fruenti abductus homo fuerit non solum ipse sed etiam heres furti agere poterit.'

Julian tells us on the authority of Sabinus that if there was a usufruct already in enjoyment, both *heres* and fructuary have the *actio furti*, which is the rule stated in the other texts. There is physical detention, and, indeed, it is probable that the *heres* on such facts has actual *possessio*, since no step is open to him by way of taking possession: the usufructuary is not bound to 'attorn' to him. But where the usufruct was created by the will, *i.e.* by legacy *per vindicationem*, and the *heres* has never possessed, the fructuary has the action so soon as his right is complete, the *heres* having none unless the fructuary has begun to enjoy.[9] The rule giving the fructuary alone the action on such facts is laid down by Julian, who represents the Sabinian view, making theft an inroad on possession. The text expressly recognizes this conception, and yet completely ignores this point when it is dealing with a usufructuary whose right is complete, but who has not yet begun to enjoy. M. Huvelin indeed holds[1]

[8] D. 41. 3. 35.

[9] The text is rejected by Schulz, who refuses to accept the doctrine of the texts which give both owner and fructuary the action (Z. S. S. R. A. XXXII, pp. 28 *et seq.*); but his theory does not seem well founded (Huvelin, *Furtum*, I, pp. 717 *et seq.*; Buckland, *Nouv. Rev. Hist. de Droit*, XL, pp. 5 *et seq.*), and there seems no sufficient reason to reject the doctrines of the texts. It is true that the words, probably corrupt, '*quod si . . . perduceretur*' have the air of a gloss (Huvelin, *op. cit.*, p. 718), but their removal does not modify the doctrine of the text.

[1] *Loc. cit.*

that the text '*se comprend aisément.*' He explains the rule as a mere survival of the old doctrine which took no account of possession: the writer simply recorded the fact without thinking it necessary to call attention to its anomalous nature. It is clear that both the theft and the action are subsequent to the entry, for till then the fructuary could not have the right *uti frui.*[2] But M. Huvelin's explanation seems inacceptable. It is hardly credible that if this was a mere survival, for an exceptional case, of an obsolete conception of *furtum*, a writer whose attention was expressly given to the point of possession would have been satisfied to deal with the case by a simple statement of a solution inconsistent with the principles he had been laying down. It is still less likely that it is to be explained, as it is by Desjardins,[3] as due to '*le vif désir qu'on devait avoir d'atteindre les voleurs des choses héréditaires.*' When Julian was writing, the rule requiring physical detention had just developed, and this makes in the opposite direction. And though, no doubt, the jurists were alive to the need of equitable correctives to strict rules, they did not produce such relaxations by crude sporadic propositions without reference to principle, though this kind of thing is sometimes attributed to them.[4] Such a thing is more like Tribonian, but there is no reason to attribute this particular subtlety to him. There must be a juristic ground for the distinction taken, and, if what has been said in the preceding pages is sound, it is not far to seek. The usufruct has no existence at all till it is fully created, till there is someone who '*frui potest.*'[5] But from that moment it is created for all purposes. It is a '*merum ius.*' '*In iure consistit.*' Physical conceptions are not to be applied to it. We may consider this as an application of the conception of '*possessio iuris*' pointed out above.[6] A man who has the right possesses the right. It is a distinct idea from that of *quasi possessio.* The same idea is expressed by Paul (if it is not a gloss[7]): '*Quia nec possideri intellegitur ius incorporale, nec de via quis, id est mero iure, detruditur.*' The words '*id est mero iure,*' whatever their origin, are a useful explanation of the text in which they are imbedded. It is only because it is *merum ius* that there can be no thought of physical expulsion.

It follows that so soon as the usufruct exists it is protected

[2] G. 2. 194; Vat. Fr. 60; D. 7. 3. 1. 2.
[3] Cited by Huvelin, *loc. cit.*
[4] See Buckland, *Nouv. Rev. Hist. de Droit*, XL, pp. 13, 16, 22.
[5] Vat. Fr. 60.
[6] *Ante*, p. 337.
[7] D. 41. 3. 4. 26.

without reference to the question whether the fructuary has begun enjoyment of the thing: the *res* is not his right. The *heres* has as yet no action, though the conditions exist which are laid down by Marcellus [8] as entitling him to sue: '*hereditariarum rerum furtum fieri et usucapionem impediri*,' for there can be no doubt that *usucapio* is barred on these facts. But these requirements are not the whole matter. There is no person in actual physical possession of the thing, and for *actio furti*, on the ground of ownership, this was essential in the second century. If the fructuary is enjoying, the *heres* also has the action, and, as was said above, probably has legal *possessio*.[1] The rule that the owner can impose a servitude, so far as it does not affect the right of the fructuary,[2] is also an expression of our principle. The fructuary has no concern with the thing as such: the owner can do what he likes with it so long as he does not affect the *ius*. The further rule expressed in the adjoining text,[3] that he cannot impose a servitude which does affect the right, even '*consentiente fructuario*,' needs more careful examination. Its oddness has attracted much attention, and it has received a host of explanations,[4] some amending the text, or otherwise explaining away the rule; others basing it on difficulties resulting from the technical civil modes of creation of servitudes, coupled with the rule that a fructuary cannot alienate. *Ususfructus* was divisible,[5] and one would have thought an element of it could have been ceded to the *dominus*. The older commentators explain it as an application of the rule: there cannot be a servitude on a servitude, but if it is classical, as it surely is, this cannot be the explanation. Whether it be due to technical difficulties or to the classical conception of usufruct, it would seem to be an anachronism in the time of Justinian. The text has probably been abridged and the argument cut out. It seems likely that if this argument had turned on the technicalities of *cessio in iure*, these would have been seen to be no longer material, and the rule would have gone; but if it had been based on the old conception of usufruct it may well have been unintelligible, and been struck out, and the rule retained. Our principle does in fact provide a reason for the rule. The servitude is a matter affecting the *res*: in relation to that the fructuary has no *locus standi*

[8] D. 47. 2. 71; *ante*, p. 340.
[1] *Ante*, p. 340.
[2] D. 7. 1. 16.
[3] D. 7. 1. 15. 17.
[4] See Roby, *de Usufructu*, pp. 124 *et seq.*
[5] D. 7. 1. 50.

whatever, and his consent to matters concerning it would have no effect at all.

It is this conception of usufruct as an absolute *ius*, having no juristic relation to the physical thing, which accounts for the fact that some jurists, including Julian, were inclined to give the fructuary the direct Aquilian action.[6] The point is that on the old view this is a *ius*, an independent right of which he is master. It is not a right in a thing, a *ius in re*. The fructuary can be thought of as *dominus* of it, so that the '*herus*' of the 1. *Aquilia*[7] will apply. It is true that this was not accepted. He had only an *actio utilis*, and this means the attainment of the view that he had a *ius in re* (*aliena*), analogous to a servitude, a first step on the road toward acceptance of the view that usufruct is in fact a servitude. The same Julian elsewhere speaks of '*dominium ususfructus*.'[8] Ulpian, who tells us[9] that usufructuary is not *dominus* (*sc. rei*), tells us that in *venditio bonorum* '*appellatione domini fructuarius continetur*.'[1] The reference is not to the main edict, which does not appear to contain the word '*dominus*,'[2] but, as it seems, to another edict cited by Lenel from Cicero[3]: '*Dominum invitum detrudere non placet*,' which indicates that Ulpian had got over the difficulty about physical expulsion from a *merum ius*.[4] In Ulpian's '*sive corporis dominus sive is qui ius habet*,'[5] '*corporis*' is surplusage if there was no other sort of *dominus*: there may have been doubt in the mind of the writer whether usufructuary could properly be called *dominus*. Even the *actio utilis* of the fructuary is rather unexpected: one would have expected an *actio in factum*.[6]

Some light, though by no means all that is needed, is thrown on the law of accrual in usufruct by this conception of usufruct

[6] D. 9. 2. 11. 10.
[7] D. 9. 2. 11. 6.
[8] D. 7. 6. 3.
[9] D. 47. 2. 43. 12.
[1] D. 42. 5. 8. *pr.*
[2] See Lenel, *Ed. Perp.* (2), p. 409.
[3] *Pro. Quinct.* 27. 84, Lenel, loc. cit.
[4] D. 41. 3. 4. 26.
[5] D. 39. 2. 13. 1.
[6] One whose *aquaeductus* is interfered with has an *actio utilis* (D. 9. 2. 27. 32), but he is owner of the *caementa*, though his right is for the moment merged in that of the soil. *Colonus*, in respect of crops, has an *actio in factum* (D. 9. 2. 27. 14). In D. 20. 1. 27 pledgee, where *dominus* does damage, has an action *quasi damni iniuriae ad quantum interest*, which does not look genuine. On the same facts the *sedes materiae* gives him an *actio in factum* (D. 9. 2. 17). In D. 9. 2. 30. 1 (harm by a third person) the only part which decides anything is compilers' work (Gradenwitz, *Interpolationen*, p. 89; H. Appleton, *Interpolations*, p. 106). But see De Medio, *Studi Scialoja*, 1. p. 29, for the view that the pledgee had no sort of Aquilian in classical law. He holds it needless, as he could claim *cessio* of the owner's action by *actio pigneraticia contraria*, but there is much that is debateable in this proposition.

as a non-physical *ius*. The Vatican Fragments show that it was the subject of acute discussion in the later part of the first century, and this is no doubt because it was a new thing. How old usufruct itself is we do not know. For Cicero it is a familiar institution, but there seems no sign of it in Plautus. It is to be inferred from Cicero's [7] allusions that in his day usufruct was 'alimentary' and usually in favour of women, possibly a by-product of the l. *Voconia*,[8] excluding women from succession, a hint having been taken from Attic law, which seems to have possessed a similar, but much less scientifically conceived, institution.[9] Cicero has no allusion to joint usufruct, nor is it to be found in juristic texts till a much later time. While the jurists of the generation before Cicero already discuss usufruct,[1] the earliest to discuss joint usufruct seems to be Atilicinus in the middle of the first century of our era.[2] It is therefore not surprising that there is a good deal of discussion of the operation of the law of accrual.

As has been said above, the rule that usufruct [3] '*personae non portioni adcrescit*' is an outcome of the fact that the right must adhere to a person. The further rule that accrual occurred after enjoyment had begun is also treated as due to the special character of usufruct. We are told [4] that, if one of co-legatees of usufruct repudiates, all goes to the other, and that this would also occur in a legacy of property, but that in usufruct '*hoc plus est quod et constitutus nihilominus amissus ius accrescendi admittit*,' for which the reason is given on the authority of both Celsus (Proculian) and Julian (Sabinian) that '*ususfructus cotidie constituitur et legatur, non ut proprietas eo solo tempore quo vindicatur.*' The case considered is that of two independent legacies *per vindicationem* of the whole, so that '*concursu partes fiunt.*' [5] Thus jurists of both schools agree that usufruct created by legacy '*cotidie constituitur.*' This is only saying in other

[7] E.g. *Topica*, 3. 17; *Pro. Caec.* 4. 17, etc.

[8] G. 2. 274.

[9] See Beauchet, *Histoire du Droit privé de la République Athénienne*, 1. 291; 2. 99, etc.

[1] Cicero, *de Fin.* 1. 4. 12.

[2] Vat. Fr. 77. Alfenus discusses *habitatio* given to A *cum* B (D. 33. 2. 40), but (1) *habitatio* in his day gave, it seems, no *ius*—it was a mere licence; (2) 'A *cum* B' (e.g. *Titia cum liberis*) gave in usufruct difficulty of interpretation much later: Vat. Fr. 86-88. Cassius Javolenus and Proculus, though they discuss usufruct and joint ownership, say nothing of joint usufruct. Sabinus mentions only the '*cum*' case: Vat. Fr. 86.

[3] *Ante*, p. 335.

[4] Vat. Fr. 77.

[5] Accrual after enjoyment has begun is not clearly impossible even in ownership, *e.g.* in *derelictio partis* (D. 41. 7. 3) (see Bonfante, *Scritti giur. var.* III, pp. 434 *et seq.*, and Riccobono, *Essays in Legal History*, ed. Vinogradoff, pp. 53 *et seq.*), and perhaps if one common owner dies without successors.

words that '*ex fruendo consistit.*' It is not only created in the first instance by the fact that there is enjoyment or capacity for enjoyment: it exists only by virtue of that capacity, and thus at every moment is created anew. Hence this accrual after enjoyment is begun is essentially an initial accrual, and is so thought of. So, too, Ulpian tells us[6] that, although '*ex fruendo consistat*,' the legacy nevertheless cedes once for all. The point of this must be that each occasion of '*fruendo*' might be thought of as a new '*initium*,' and someone had urged that therefore it ceded anew every day. This conception of usufruct would lead to a rule that it could not be lost by non-use,[7] for a man could not lose what did not exist at all, and what he lost would be only what he had enjoyed. The practical rule actually applied was that he lost by non-use or *capitis deminutio*, not what he had been enjoying, but what he had acquired the right to enjoy. If a usufruct had been '*repetitus*' on *capitis deminutio* his right to the new usufruct was unaffected. This, indeed, follows from the rule that a *capitis deminutio* before *dies cedit* is immaterial.[8] Where there were (say) three usufructuaries, with a right of accrual, A, B and C, and A lost his share, *e.g.* by non-use, this passed to B and C. If now B lost his share by non-use, since accrual is *personae non portioni*, there is accrual back to A. What is the extent of this? If we take the principle strictly it must follow that he has lost nothing of his right of accrual, and A and C will share the lapse equally. And it is clear that this view was held.[9] But the view which prevailed, and was apparently definitely established by Pomponius,[1] was that he had lost not only the share of the usufruct which he was then enjoying, but also any right of accrual out of it, so that he will share with C only the part of the usufruct which B originally had, and not the part of it which fell to B by A's non-use or *capitis deminutio*.[2]

This point of view explains a puzzling statement of Sabinus. After a discussion of a point which we need not consider, it is said[3]: '*Quamquam Sabinus responderit, ut et Celsus . . . refert, eum qui partem usufructus in iure cessit et amittere partem et ipso momento recipere, quam sententiam ipse ut stolidam repre-*

[6] Vat. Fr. 59.
[7] So Windscheid, *Lehrbuch*, § 645, n. 4. He does not seem to contemplate historical change, but harmonizes texts by the assumption of glossation.
[8] *Ante*, p. 335.
[9] Vat. Fr. 76; D. 7. 2. 1. 2; D. 7. 4. 3. 2.
[1] Vat. Fr. 76.
[2] See Windscheid, loc. cit., who, however, suggests a distinction between loss by non-use and by *capitis deminutio*; *post*, p. 346
[3] Vat. Fr. 75. 5.

hendit: etenim esse incogitabile eandem esse causam cuique et amittendi et recipiendi.'

It is to be noted that Celsus is not fair to the contention of Sabinus, who does not say that the same fact is the '*causa*' of both events. It is the *causa* of the loss: it is only the occasion of the regaining. The *causa* of this is the original gift. No more has happened here than happens wherever a usufruct is '*repetitus*' on *capitis deminutio*; the *deminutio* is the *causa* of the loss: it is the occasion of the immediate regaining. And whatever Sabinus was he was not stupid: his opinions were not '*stolidae.*' If he said this it was because there was a conception of usufruct behind it. It does not seem that he is thinking of a joint usufruct: the holder cedes a part of the usufruct which he holds. And it is not *cessio* to the *dominus*; in that case there would be no immediate regaining.[4] In the settled classical doctrine a fructuary who attempts to cede to a third party, '*nil agit.*'[5] This is a rather unexpected result. If a *tutor cessicius* tries to cede his *tutela*, he fails, but he loses his *tutela*.[6] If a *heres legitimus* (or *scriptus*) tries to cede the *hereditas* after entry, he fails, but he loses his rights.[7] If a common owner tries to free a slave '*vindicta*,' *i.e.* by *cessio in iure*, he fails, but he loses his rights.[8] If a *suus heres* purported to cede, the Proculians held, on the same lines, that he failed, but lost his rights. The Sabinians, however, held that his act was a nullity.[9] There is here a sharp division of the schools, and in the earlier parts of our text the citations suggest the same thing. But the point at issue there is different, and the reference to Sabinus is merely incidental. There was a difference, indeed, in the case which concerns us. Pomponius says it reverts to the *dominus*.[1] But this is not material: it does not seem to be a school difference, nor, if it were, does it seem that the difference in relation to *suus heres* rests on the same ground: it is probably that the Sabinians held the position of *suus heres* not to be variable at the choice of parties.[2] The point for us is that the strange view of Sabinus rests on a conception of usufruct. When it was the dominant view is unimportant. It expresses the extreme ideal view. What he loses is only what he has been enjoying, and he

[4] On both points see the earlier part of the text: Vat. Fr. 75. 4.
[5] G. 2. 30.
[6] Ulp. 11. 7.
[7] G. 2. 35.
[8] Ulp. 1. 18; P. Sent. 4. 12. 1.
[9] G. 2. 37.
[1] D. 23. 3. 66.
[2] In fact the Sabinians held, contrary to the Proculians, that it did in fact make a difference that he was *heres* '*invitus*': G. 2. 37.

immediately acquires a new right of enjoyment. In a later time Gaius expresses the practical result of this old view by the words '*nil agit.*' But the rule has survived the theory which gave birth to it. The same principle, however, would prevent loss by *capitis deminutio* or non-use. As to the former, there seems no sign that any such notion was applied. It may be that as Windscheid [3] says, this was too fundamental a change to be ignored. As to non-use there is not much evidence. It is not prominent in the texts.[4] When it is remembered that acquisition of these rights by long enjoyment was a late introduction, it seems possible to think that non-use, at any rate for a definite time, was not recognized as a ground of loss in the time of Sabinus, or, indeed, till the extreme ideal conception was obsolete. The earliest jurist to mention it seems to be Pomponius, who discusses it in his 'ad Q. Mucium.' [5] Other texts suggest association with the name of Plautius.[6] It may well be that the rule grew towards the end of the first century out of speculative consideration of the question whether, just as immemorial user was a conceivable root of title to servitudes, before there was a settled rule of acquisition by possession for a definite time, and without any strict rule as to what 'immemorial' was,[7] it might not be contended that if it were shown that for a long time there had been no enjoyment this might be evidence that there was no right or that it had been ceded to the *dominus*.

There is a further point to be considered in the remark of Sabinus and the illustration in the preceding passage.[8] They speak of the fructuary as ceding a part of his usufruct. This is a rather artificial hypothesis, and leads naturally to the assumption that the rule would not apply if the whole had been ceded ineffectively. In that case he would have lost the whole right as he did in other cases of ineffective *cessio*. The question arises: Why? The probable answer appears to be that when Sabinus wrote—and he is earlier than Julian by the better part of a century, the rule '*personae non portioni*' [9] had not yet appeared. It must be remembered that a fundamental rule affecting the application of this principle was not settled till the time of Pomponius, who is later than Julian. If so, he must

[3] *Loc. cit.*
[4] Paul and Ulpian mention it in the Vatican Fragments, 46, 75. 4.
[5] D. 7. 4. 22, 25.
[6] Vat. Fr. 75; D. 7. 4. 20.
[7] D. 39. 3. 1. 23; Bonfante, *Scritti Giurid.* 2, pp. 956 *et seq.*; Partsch, *Longi temporis praescriptio*, pp. 109 *et seq.*
[8] Vat. Fr. 75. 4, where, however, it is to the *dominus* and is effective.
[9] D. 7. 2. 10, etc.

still have had a share, for the question of accrual to arise. And in the time of Sabinus he would not be barred by the fact that the accrual was out of what he had already lost. The question arises: What is the origin of the rule '*personae non portioni*'? It is a reasonable inference from the view of usufruct as attaching to a *persona*, but not inevitable. It might have been held, and probably was at one time held, that, once detached from the *persona*, it was wholly lost. The new rule may have had its origin in *consolidatio*: the fructuary, by acquiring ownership, has technically lost his usufruct, but justice requires that he should not thereby be penalised. A text in the Vatican Fragments may give a hint as to the history. After discussing the case of accrual where the land is left to one and the usufruct to another, so that they concur,[1] it adds a discussion of usufruct to two, of whom one acquires the ownership, *consolidatio*, and considers the question of accrual. The solution we have already considered.[2] Julian had held that there was accrual in favour of the holder of ownership, but not the other way, obviously on the ground that the *ususfructus consolidatus* has ceased to exist, and cannot therefore accrue to the other, a rigid doctrine of which the actual decision is an equitable relaxation. The discussion is quoted from Neratius, Aristo and Pomponius, and as the rule of accrual after enjoyment had begun was not really settled till after Atilicinus,[3] it seems possible that in the time of Aristo and Neratius it had not got beyond *consolidatio*, though Julian speaks of it in general terms.[4]

In another Vatican text,[5] abridged to the point of obscurity, the case is discussed of a usufruct to a common slave of A and B, and to T. Where A loses his share, Julian gives the whole accrual to B. Ulpian asks what those who disagree will hold. Does all go to T, or do B and T share? The man who consulted Julian, says Ulpian, seems to have thought it might accrue to A and B. This is the same as the '*stolida sententia*' of Sabinus, and the rule against accrual out of what one had lost, by reason of which Ulpian passes over the suggestion, was not fully recognized at the time of the consultation.[6] It is a belated expression of the idea that usufruct consists in acts of enjoyment.

W. W. Buckland.

[1] Vat. Fr. 83. The word used is '*proprietas*'; the reproduction in the Digest uses '*fundus*,' which the sense requires: D. 7. 2. 3. 2. Cf. D. 33. 2. 19.
[2] *Ante*, p. 329.
[3] Vat. Fr. 77.
[4] D. 7. 1. 33, Papinian.
[5] Vat. Fr. 76.
[6] *Ante*, p. 337.

WHAT AN OLD REPORTER TOLD ME.

II.

A VERY GREAT ADVOCATE.

FEW of the statues in Westminster Abbey give so lifelike an idea of the man whose memory they perpetuate as does that of Sir William Follett. The inscription on it came from the pen of no less a statesman than Sir Robert Peel. Follett always seemed to me to be *facile princeps* as an advocate: take him for all in all we shall not look upon his like again. He was an instance of a very unusual combination of many minor advantages rather than of the possession of any extraordinary single talent. His most striking characteristic was the facility with which he always conducted his cases. For he caught with great quickness the idea which he was desired to take up; and immediately found apt words to describe it. I observed this in Chancery cases in which I was counsel together with him; whether as his own junior or as acting for some other party to the suit. He was seldom well acquainted with his case; but he could readily adopt his junior's suggestions, or make use of the books handed up by him. Moreover, his voice was delightful to hear. I have no doubt that it often soothed irritable judges and charmed indolent ones; such as Lord Tenterden in the former case, and Lord Lyndhurst in the latter. I have heard Follett argue before Lord Tenterden with a gentleness and clearness and tact which stilled the gouty impatience that the old man had just evinced towards other counsel. All the attorneys present must have seen that the best possible chance to make a legal argument succeed would be to entrust it to Follett (though a junior), if you could not give it to Scarlett. Yet Scarlett, though reputed to *dominate* Lord Tenterden, could not *persuade* him in such happy words nor in such melodious tones. Follett's manner, too (which was always recalled to me by that of Lord Cairns when at the bar), was amiable; which Scarlett's never was. Follett's tones were seldom triumphant: for it was seldom necessary. But I once heard them not only triumphant, but terrible. That was

at Lord Cardigan's trial, when justice was defeated by Follett upon a mere technical defect, discreditable to the Crown's legal advisers.

Lord Cardigan's Trial.

Lord Cardigan, a peer of the realm, was tried in 1841 by his peers, for fighting a duel; an offence which had then recently been altered by Statute from a capital crime to a specific felony, punishable with seven years transportation. I was present at the trial; and stood at the bar immediately behind the Attorney-General (Campbell). The Lord High Steward who presided (specially appointed, as usual, for the purpose) was Lord Denman; because the then Lord Chancellor was very ill. Upon Denman's advice the House determined that a witness, Sir James Anderson, was entitled to refuse to answer any question (except as to his own name), because he professed his own opinion to be that the answer might criminate him (viz., by proving that he had been present at an unlawful meeting). The privilege of a witness in this respect had never been carried so far before. The spectators present at the trial were turned out whilst the House deliberated on the witness's objection. Upon our re-admission we found the Lord Steward putting, to each peer separately, the question of guilty or not guilty. This, he had previously told them, must be decided in the negative; in consequence of Follett's technical objection that there was no proof of all the three Christian names of the wounded man as set out in the indictment—a proof which had been expected to be given by Sir J. Anderson. Yet all the facts of the crime had been completely established by the evidence given; and it was of great importance that there should be a conviction under this new law that made duelling an ordinary vulgar felony. Nothing could have been in worse taste and manner or more humiliating than were both of Campbell's speeches on this occasion. In his Life of Lord Lyndhurst he has called this trial 'a farce.' But there was nothing to make it so, except his own conduct of it; which created the suspicion then current, and now confirmed by his description, that the prosecution was deliberately intended to fail. The indictment ought to have contained additional counts alleging varied Christian names. No one who saw Follett's triumphant manner that day could fail to understand why Campbell was unwilling, after he should retire from office, to remain at the bar and have Follett for his rival.

An Advocate's Opinion of His Case.

I remember the widespread discussions aroused by the speech which Charles Phillips made in 1840 in defending Courvoisier for murder. They elicited from lawyers a universal agreement upon two principles. The one, that in no proceedings, civil or criminal, ought you ever to express any personal opinion about your client's innocence; the other, that if he confess to you his guilt, your sole duty is to see that he is not convicted illegally.

Were advocates permitted to profess their personal belief about their cases, any advocate who omitted to declare his client innocent would be regarded by the jury as having tacitly admitted that his client was in the wrong. I recollect such a declaration being nevertheless made by Serjeant Shee in 1856, when defending a surgeon named Palmer for poisoning with strychnine his friend Mr. Cook. Shee said to the jury, 'I commence the prisoner's defence (I say it in all sincerity) with an entire conviction of his innocence.' The presiding judge, Lord Campbell, does not seem to have made any protest at the moment. But he made one, a few days later, in his summing up; warning the jury against being influenced by that expression of 'private personal opinion,' and condemning such expressions, for (he added) an advocate 'should press upon the jury his arguments, not his opinions.'

Serjeant Ballantine, in his autobiography, suggests a reason for Lord Campbell's not reproving Shee's words immediately on their being uttered. It is, that he remembered a kindred utterance of his own (when defending Lord Melbourne against the charge of adultery with Mrs. Norton); and did not wish it to be brought up against him. But in justice to Lord Campbell it must be noted that what he had said was—not that he himself personally believed Lord Melbourne to be innocent—but only that Lord Melbourne had instructed him to declare 'in the most solemn manner' his innocence of any criminal intercourse with Mrs. Norton. It must be remembered that the law of those days did not allow Lord Melbourne—he being a party in the litigation—to go into the witness-box and make his declaration there.

I discussed Palmer's case on many occasions with one of Shee's team—the late Mr. Justice Grove. He had been brought into this poisoning case specially; in consequence of his world-wide reputation as a chemist. He told me over and over again that he was quite sure Cook was not poisoned by strychnine. Beyond 'by strychnine' he never carried the negation. I heard

a great deal incidentally from Grove about Shee's conduct of the defence; which he represented as being all that could have been done, except that it was a little too evidently tinged with anxiety. But he never mentioned to me Shee's unfortunate expression about Palmer's innocence.

There is the converse case of an advocate who, either through an express confession to him or through some other cause, has become convinced of his client's guilt. What is his duty? I remember that in 1827 when leader of the northern circuit, Sir James Scarlett (afterwards Lord Abinger) had to defend Edward Gibbon Wakefield (afterwards prominent in the colonization of South Australia and of New Zealand) for the abduction of Miss Turner. Scarlett was attended in consultation by Wakefield himself, who was out on bail. On observing that Wakefield assumed a jaunty and confident air, Scarlett said to him, 'Mr. Wakefield, if you think that I am going to do anything more for you than to see that you are not convicted illegally, you are very much mistaken.' And convicted with strict legality Wakefield was. Townsend, in his account of Wakefield's case in his 'Modern State Trials,' records that at the trial Scarlett seemed impressed and annoyed by the hopelessness of his defence.

Ex-officio Informations.

I well remember how, in 1830, Sir James Scarlett, then Attorney-General, was the most unpopular man in England. He had filed ex-officio informations at the instance of the Premier (the Duke of Wellington) in order to repress political attacks upon the Duke in newspapers. The popular indignation against Scarlett was not occasioned merely by his prosecuting libels of this kind; which he might properly have done, if in one of the usual modes of (1) action, (2) indictment, or (3) motion for leave to file a criminal information. It was occasioned by his adopting instead the disused and arbitrary mode of proceeding called 'Ex-officio Information,' which an Attorney-General was at liberty to file without judicial leave; but which no Attorney-General had recently filed, and which Sir Vicary Gibbs had long before rendered himself utterly unpopular by filing. So unpopular indeed that Gibbs despaired of further promotion and became willing to accept a puisne judgeship. Scarlett not only took this most undesirable short cut to his prosecutions, but he conducted the trials themselves in the bitterest manner; and he used his great influence over Lord Tenterden to induce

him to charge the jury most strongly for a conviction, and then, after conviction, to pass a severe sentence.

A Career of Mistakes.

The very singular professional career of Mr. James Stuart Wortley, once Solicitor-General, deserves remembrance. For the curious course of his professional life is a caution against the mistaken views we all are apt to take of our own qualifications and prospects.

Beginning life at the bar as a younger son of Lord Wharncliffe (the most active of all peers in the 'Private Business' of Parliament), his expectations must have been that committee work in both Houses would afford plentiful scope for his exertions as counsel. He had the kind of talent suitable for committee business; a business for which (except in the case of 'Election Committees') no legal knowledge was necessary. Even the ordinary rules of evidence were, as I well remember, disregarded in those days before all committees; except election committees, for there those rules were fought for very severely. Wortley was made a Queen's Counsel in 1841, when under ten years' standing; which was thought an outrageous concession by an outgoing Chancellor to the desire to please Lord Wharncliffe.

In 1842 he was elected as an M.P. and this destroyed his business before committees. This mistaken step was soon followed by another of a very similar character. That was his acceptance of the place of Judge-Advocate, which involves being sworn of the Privy Council; and is held by a purely political tenure. It practically precluded practice at the bar; for it then was understood that the fact of being a Privy Councillor precluded practice at the bar of any Court of the country, except the House of Lords; since many of the judges are not Privy Councillors. I remember that it was given out that Wortley did expect practice before the House of Lords. The instances, however, in which practice there is ever given to men who have not been engaged in the same case 'below' are so very few that Wortley must have found himself very much mistaken. Hence he became willing to accept the post of Recorder of London. Here he was the right man in the right place, if he could but have continued to think so. Serjeant Ballantine says he made a good criminal judge; and moreover he had a dignified bearing in city assemblies; and he was a bulwark of the City's privileges, in his place in Parliament and in his rank in society. But he conceived an ambition to be made Solicitor-General.

At the price of changing his politics he became in 1856 a supporter of Lord Palmerston upon the terms of being made Solicitor-General.

It is surprising that Wortley should have taken upon himself a burden which, after so long an absence from forensic practice, the strongest man would not have been able to bear. Innumerable questions of foreign law and international law and constitutional law constantly require the attention of the Solicitor-General. Moreover, everybody but Wortley could see that upon all Government business, whether out of Court or in Court, Bethell, as the Attorney-General, would be the most exacting and the most contemptuous of masters to serve under. When Bethell was merely Solicitor-General, in Cockburn's Attorney-Generalship, Cockburn complained to a friend of mine, with tears in his eyes, of Bethell's treatment of him. Moreover, inasmuch as Bethell was wholly an equity man, the duty of conducting all the Government business in the common law Courts would necessarily devolve upon the Solicitor-General. After a very few months of Wortley's Solicitor-Generalship it became known that his mind had given way; and he very soon resigned his place. When his health returned, not only was the Recordership hopelessly gone, but he had also lost the family seat in Parliament which he had held. He lived thenceforward in retirement till his death a quarter of a century later.

His breakdown may help to account for the similar total collapse of another man—a man of great importance—Sir John Karslake. I cannot but think that he, too, succumbed because the duties of a law officer of the Crown were cast upon him without his being equal to them. From a long and intimate acquaintance with many of the foremost men at the bar I have learned that most of them know hardly anything of constitutional questions, home or foreign. Hence to be obliged to answer, offhand or after a few hours' consideration, questions upon such subjects—whether for the Government or for the satisfaction of Members of Parliament—would drive such men to distraction: unless they had the cool self-possession of Bethell, who would run all risks to dispose of them or would create devices for getting rid of them. But even such resource would be available only for the first law officer and not for his Solicitor-General. Karslake had greatness thrust upon him by his being made Solicitor-General in 1866, when he had never sat in Parliament, and had not any seat even in prospect, so that his party were obliged to make a vacancy for him. I had known him for a good while; and when I last saw him it was just after he had

become Attorney-General. His appearance was still that of a tower of strength: very tall, very handsome, very erect. His failure was a failure of nerves only. It affected first his optic nerves; and afterwards his whole nervous system, paralyzing not only his limbs, but his brain, and making him totally imbecile; at an age at which many years of physical and mental vigour are still left to most men.

Charles Austin and the Parliamentary Bar.

The fame of John Austin is still preserved by his lectures on Jurisprudence. I was one of the class who listened to them. Amongst the members of it were J. S. Mill, Roebuck, Lord Romilly and Lord Belper: all four of whom drank up Austin's venom most attentively. His private conversation was as overbearing and ill-tempered as were his lectures. He seemed to say: 'If you don't agree with me, you must be the biggest fool that ever was.' But the once greater fame of his far more successful and once far more prominent brother, Charles Austin, has almost vanished. Business in the London Courts of law Charles never had; but he played an extremely conspicuous part as a Parliamentary Counsel. Lord Campbell even says that in the session of 1834 Charles Austin's Parliamentary fees brought him forty thousand pounds. But I am sure they did not then bring him even that number of shillings. I see from the Annual Register of that year that only one Railway Act of importance was passed in it. Not until afterwards was Austin's Parliamentary business even large enough to lead him to give up going circuit. It was not till two years later than 1834 that there was any great pressure of Railway Bills upon Parliamentary Committees. But in 1836 there certainly did come such a pressure; and Charles Austin had a good share in it. The course had been cleared for him by the retirement of some counsel, either through their getting into Parliament themselves, or through old age, as in the case of William Harrison, or death as in the case of Henry Hall Joy. Those two men had been the only ones who confined themselves to Parliamentary work, and thereby initiated a 'Parliamentary Bar.' From 1837 onwards I was sufficiently often engaged before Parliamentary Committees to have good opportunities of seeing how much work Austin had, and what was the cause of the ascendancy which he was acquiring in it. In 1841 and 1842, on a Bill for the improvement of the Severn, I was one in a team of three, against a team of three stuff gowns on the other side, of which

Austin was the leader (a few months afterwards he took silk). He seemed not to have any difficulty at all in being present in this committee whenever he was wanted; though difficulty he would have had if he had then been in request in most or many of the other committees. There came a day, however, in 1845 when so many committees were sitting at one and the same time as to exhaust the services of all the Members of Parliament capable of being made to serve on them. Austin was engaged upon so many as to make it impossible that he could do justice to half of his engagements. At that time no alteration had been made in the old composition of such committees; viz. five selected members, unconnected with the district, and also all the members who were connected with the district, either as county or borough members. This composition, in the case of a railway, a river, or a canal, extending as it would through several counties, created 'a mixed multitude' of committee-men, liable to be swayed by local interests and prejudices. Upon such an assembly Austin could make play by a confidence of manner and a readiness and accuracy of language very unusual indeed in the counsel practising before such committees. (Very soon afterwards the present practice, of only five selected members, was adopted.) That year, 1845, was the time of the innumerable 'bubble' Railway Companies, when the eagerness to get the scrip of some new project equalled even the excitement of the South Sea Bubble. Mr. George Hudson, then called 'the Railway King,' but who afterwards came to utter ruin, was at this time the adviser of many people as to what schemes they should invest in. So many people made great profits by acting on his advice that they combined to give him a money testimonial of their gratitude while he was still in his prosperity. Their subscriptions amounted to between seventeen and eighteen thousand pounds, which were handed over to him. Although many of these schemes came to nothing, they were carried so far as to get into committee, and to be advocated there by rival counsel. In the same year it was that there occurred what was called the 'Battle of the Gauges'; which was fought between great rival railway companies, with the hope of determining whether the future of the general railway system of England was to be the narrow gauge or the broad. The consequence of all this furore was that Austin had briefs almost without number; with original fees almost without stint in amount; besides the daily refresher fees of ten guineas and daily consultation fees of five guineas, which usually made up the chief part of Parliamentary profits. The lavish variations of the original

fees were intended to induce the counsel not only not to appear against his clients, and to appear for his clients when he could, but also to sacrifice his other clients in other committee rooms. Thus some gave higher fees, in proportion to the work to be done, than others did. Amongst all sorts of professional irregularities to which the wild excitement of the time gave rise I remember one mentioned to me by a barrister. It was that Austin, once when he was urgently required to cross-examine a particular witness in a committee room in which he was not (but in which he was as much bound to be, as in that committee room where he was) could not be induced to come to meet the emergency until the agent handed to him a little additional brief with the words endorsed upon it, 'Mr. Austin, to cross-examine A B, five hundred guineas.'

Having regard to this insane excitement, and to the circumstance that even lawful Parliamentary fees were immensely greater than Court fees, it is just possible that Austin may have made in the year 1845 (but, I should think, never else) as much as the forty thousand pounds which Lord Campbell credits him with.[1] The largest sum which I ever heard of as having been made at any time in one year by any counsel in practising in the Courts was twenty-one thousand pounds. That sum was said to have been made in one twelvemonth (1829-30) by Scarlett when he was Attorney-General. And even this was in great part due to the profits of the Attorney-Generalship; which, according to the system then in force, were enormous in proportion to the work done for them. The largest fee that I remember as having been paid in my time in a single litigation was on the appeal to the House of Lords in *Small* v. *Attwood*, as to rescission for fraudulent misrepresentation. Sir Thomas Wilde received five thousand guineas with his brief; and must have also had a daily refresher of ten guineas on each of the subsequent forty-five days of the hearing, and probably several consultations at a fee of five guineas each.

It has been said that the Solicitor-Generalship was once offered to Austin. If so, it probably was in 1846; when there must have been great difficulty in filling up the place, and when Austin might be thought willing to exchange Parliamentary profits for Official and Court profits. For it was then well known to himself, as well as to others, that his Parliamentary work was killing him. About that time he discontinued it for a while. But he could not persuade himself to relinquish it.

[1] A legal colleague assured me in 1889 that Austin himself had told him of having made fifty-four thousand pounds in one year.—C. S. K.

Accordingly, although still perfectly cadaverous in appearance (as he had long been), he returned to it. But not for long. At last, and only just in time to save his life, he made a violent plunge away from it, and closed the door of his chambers; and also their shutters, which were in Middle Temple Lane. Soon there appeared, chalked up upon these shutters in large characters, 'Gone to California'; the world's then newly discovered gold-mine. Austin was not yet fifty. He soon bought a place in Suffolk, Brandeston Hall, where he established himself. There he lived some years as a bachelor. Then he determined to be married, and came up to London and asked one of his married lady-friends to recommend him a good wife. He married the excellent lady recommended, and had a family of children. He did the usual duties of a country gentleman, and served as High Sheriff, grumbling very much (*more suo*) at the expense. He died in 1874 'full of days, riches and honour,' having, although supposed to be an intense Radical, devised all his real property in the severest strict settlement, and having directed by his will that all his personal estate should be laid out in land, to be settled in the same way.

Even apart from the pecuniary loss involved, Austin would have exercised a very unsound discretion in accepting the Solicitor-Generalship. He had been long out of the practice of the Courts, and wholly engrossed by a kind of business for which no legal knowledge is really necessary beyond a little acquaintance with the rules of evidence—rules which in no committee, except election committees, were really observed. But no man can properly discharge the duties of Solicitor-General without a perfectly ready familiarity with the business of the Courts.

Lord Brougham.

From so early a date as 1820 I can remember how vast a space Lord Brougham filled for many years in the minds of his countrymen; and how great were the public services which—from whatever motives—he rendered. In January, 1833, I began to draw Bills in Parliament for him; and thus came to know him well. One of those Bills was the Boundary Act, which supplemented the Reform Act of 1832.

One of his great services was his abolition in 1832 of the old and inefficient Court for appeals in ecclesiastical cases—'The High Court of Delegates.' His transfer of its jurisdiction to the King in Council was followed in 1833 by his creation of

the Judicial Committee of the Privy Council. That Act of 1833 I myself drafted, under his personal direction.

One of the pleasantest traits in his combative nature was his intense affection for his invalid daughter. I remember her well. For several years before her death her face was of a red so deep as to be almost black; in consequence of serious disease of the heart. Her life is described by Lord Wellesley as having been 'one continued illness'; yet her spirits were so bright as to be a constant enjoyment to her father. When she died, he sought and obtained permission from the Benchers of Lincoln's Inn to bury her under their chapel; leading them to hope that he would himself be interred beside her; a hope not fulfilled. His home at Cannes he named after her—the Château Eleanor Louise. When he was made Chancellor, the first person to whom he gave the news of his having accepted the Great Seal was (as his friend Bellenden Ker assured me) his little nine-year-old girl.

He was the greatest Parliamentary orator of his time. The source of his copious vocabulary and of most of his similes lay in the careful lessons in Scripture which he had received from his mother. Everything connected with oratory interested him. I remember his once asking William Allen, the Quaker, to describe the voice of Pitt; whom Allen had often listened to. The reply was, 'It was so sweet that, when Pitt had ceased speaking, his tones seemed still to linger in your ears. I thought it a curious parallel to Milton's

> The angel ended; and in Adam's ear
> So charming left his voice that he awhile
> Thought him still speaking, still stood fixed to hear.

Charm of voice and flexibility of voice add greatly to the influence of any public man. They contributed largely to the power of O'Connell; and great his power was, even over an English audience. In the House of Commons I have heard him assailed with shouts of execration; and yet, later on in the very same evening, cheered to the echo there. Lord Brougham was pre-eminent for similar gifts of voice. In *Queen Caroline's case* he exercised them with such extraordinary charm that one of the listeners told me that, when Brougham began to speak, the speeches of all who had preceded him 'seemed to have been only like the scolding of old women.' The variety of his modulations of voice could produce an astonishing effect; as when he made every peer start in his seat by the thundering outburst—'My Lords, am I in a Court of justice?' Far the greatest effort of rhetorical skill that I ever heard, either out

of Parliament or in it, was Brougham's judgment in 1831, in Mr. Wellesley's case, with respect to Parliamentary privilege. Lincoln's Inn Hall was full to the doors, so closely filled that you might have walked on the men's heads; yet the silence was so profound that Brougham's lowest tones were heard perfectly. Sitting in his chair he displayed to the utmost all his wonderful skill in modulating his utterances.

Lord Campbell.

Unlike Brougham, Lord Campbell had no pretensions at all as an orator. My early recollections of him in the King's Bench, when I was a learner in the 'Students' Box,' are of a painfully hammering manner, with a very unpleasant Scotch accent. An article in the *Morning Herald*, reputed to be from the pen of Brougham, once described him as 'both at the Bar and in Parliament the dullest, dreariest, most insufferable proser that ever deadened a debate.'

But Campbell won deservedly a very high place among practitioners at the bar and among the judges of the common law Courts. Yet in the House of Lords and Privy Council he can hardly be said to have acquired much further judicial reputation. And as the head of the Court of Chancery his merit chiefly consisted in the discretion with which he avoided committing himself; for he realized, soon after becoming Lord Chancellor, that he was almost entirely ignorant of equity law and practice.

As an advocate at the bar, he had always done the greatest service to his clients that the union of learning and judgment could ever do; for he was both wise in counsel and excellent in working. He had invincible plodding industry, coupled with great shrewdness and great physical power of endurance. Thus in Lord Melbourne's case in 1836 Campbell defeated an action brought by Mr. Norton as an injured husband, which was supported by much personal and family feeling, but still more by bitter political animosity. The difficulties of struggling against suspicious appearances and base testimony required an amount of tact which perhaps no one else, then at the bar, would have had. It was always understood that Campbell made Lord Melbourne sensible of his obligation to him in the most irresistible manner. Indeed, nothing less can account for his forcing Lord Melbourne to the difficult and unhandsome proceeding of displacing Lord Plunket in order to give Campbell the Lord Chancellorship of Ireland, though it could not possibly

last more than a few weeks. But it gave an excuse for a peerage, which would withdraw him from the bar; at which, whenever he ceased to be Attorney-General, he would soon have been bonneted and extinguished by younger men, especially by Follett.

During the six years between my beginning to practice in Court and his leaving the bar (1835-1841) there had been only two occasions on which he came into any branch of the Court of Chancery. I was present at both. The first was a purely common law question; upon an award which had been made a rule of the common law side of the Court of Chancery. The dulness of his speech on that occasion is impressed on my memory by the recollection that the counsel on the other side (Serjeant Talfourd) began his answering speech by saying: 'I have listened to the speech of my learned friend the Attorney-General with that pleasure with which one always hears what he says.' This exordium struck me as most inappropriate. The other case related to the bankruptcy of old Mr. Chambers, the banker in Bond Street. I was briefed in it, along with Campbell and Bethell. We attended him in consultation in the Temple; and he very candidly said he did not think he could do us any good. We had much difficulty in persuading him to come. But he behaved very good-naturedly about it, and came; although I do not suppose that he had any honorarium beyond the ordinary fee which he would have received elsewhere.

When he retired from the practice of the bar it was with the almost unprecedented intention of keeping alive his claim to judicial office at the earliest opportunity; a claim which is considered to be put an end to by retirement from practice, except when a Lord Chancellor has been unavoidably displaced by political changes. For he is entitled to be put back as soon as political restorations make it possible. To keep alive his connexion with law, Campbell threw himself into legal literature. He possessed literary powers; and his long experience had given him a large fund of anecdotes, old and new, by which he knew he could make biography amusing. The first instalment of the 'Lives of the Chancellors' appeared in 1845, in three large volumes; marvellous results of industry.

On the very night on which he died, Lord Campbell had given a dinner-party. When it broke up, Lord Abinger, his brother-in-law, wished him 'Good-bye.' Campbell (so Chief Baron Kelly told me) replied: 'Good-night, but not good-bye. For we shall meet on Monday.' It was then Saturday. Abinger answered 'Good-night, then. We shall meet on Monday.' Next

morning Lord Campbell was found dead in his bedroom. On the Monday, by a curious coincidence, the brother-in-law died also.

Some Lights of the Law.

Lord Gifford was a singularly conspicuous instance of a sudden elevation at the bar, due to the accident of his once being the only barrister available who knew any Scottish law. He was an instance, too, of the difficulty which embarrasses a common-law practitioner if he accepts a judgeship in Chancery. An old silk who knew him after he took the Mastership of the Rolls, told me that Gifford, after hearing an equity case argued, would sometimes retire to his private room with tears in his eyes. He set himself earnestly to studying Chancery law and practice; but the strain of study and the sense of incapacity were too much for him, and he died at the early age of forty-seven. Brougham, on becoming Chancellor, feeling the same difficulty, set himself to similar study; and his extraordinary physique carried him safely through it. Lyndhurst was too indolent to follow their example; and managed to find relief in a readiness to affirm the decisions which came to him on appeal.

Vice-Chancellor Shadwell gave, in Lyndhurst's Chancellorship, a judgment which was so monstrously at variance with settled principles that it astonished the whole profession. It was appealed from; and was supposed hardly stateable without being reversed. Lyndhurst heard the appeal, took time to consider his judgment, and afterwards pronounced a decree affirming Shadwell's decision. That same morning the decree came to the knowledge of Vice-Chancellor Knight Bruce whilst on the bench in his own Court. He at once wrote to Lyndhurst that the affirmance was in opposition to the strong opinion of the whole profession. Lyndhurst accordingly told the Registrar not to give out the decree of affirmance; and told the counsel in the case that he wished to have the appeal re-argued by one counsel on each side. It was so argued. And Lyndhurst then reversed Shadwell's decision.

Shadwell's decisions were very frequently impaired by his disastrous inability to resist the influence of the one dominant counsel under whose control, for the time being, he was. At first this ruler was Sugden; then came Knight Bruce; who was succeeded by Bethell, who proved a greater tyrant and a more fertile source of bad decisions than either of his predecessors. Shadwell seemed to us to feel this; and to seize every instance of Bethell's absence, at any time when judgment was being

delivered, as an occasion for redressing the balance of injustice by deciding *against* him.

Lyndhurst began his career as a violent Radical. But soon after his successful defence of Dr. Watson, who was prosecuted for treason, he (then Serjeant Copley) was returned to Parliament for a Government borough, under a Tory Government; and he remained to the end of his life a Tory. The then leader of the House of Commons, Lord Castlereagh himself, was present at Watson's trial. The current story in the Courts ran that Castlereagh was so much impressed by Copley's masterly speech that he sent to him, in Court, a slip of paper. It bore the words: 'What a pity it is that your principles prevent your advancement!' But Copley simply wrote, on the same slip: 'They don't'; and sent it back to Castlereagh.

Lord Kingsdown (Mr. Pemberton Leigh) had perhaps the most judicial mind that ever was. His judgments established the reputation of the Judicial Committee; for they are models of forensic reasoning. He was greatly respected; though his reserve and his bad temper prevented him from being popular. He had been embittered by being refused by the daughter of one of the Masters in Chancery. He suffered also a singular pecuniary disappointment. An estate of some £12,000 a year had, by the first will of his kinsman Sir Robert Leigh, been devised to him in fee simple. But afterwards Sir Robert, on being assured by the wife of his groom that he was the father of her boy, made a new will; in which he cut down the fee simple to a life-estate, with remainder to the supposed son.

Lord St. Leonards (Mr. Sugden) was a barber's son. He began life as a copying-clerk to a 'certified conveyancer' named Groom; who spoke highly of his abilities. The lad's father, whilst shaving Mr. Duval, the famous real-property lawyer, repeated to him the praise. Thereupon Duval kindly agreed to take the youth as a pupil into his own chambers.

Lord Cottenham's judgments deserve careful study; for they reveal the whole intellectual process by which he, a man of eminently judicial mind, came to his decisions. Lord Langdale's judgments, on the contrary, only give you the premises (which he stated with great precision) and the conclusion (which he stated with great confidence). The bridge between them you are left to build for yourself.

Lord Justice Knight Bruce had been articled to a solicitor and served his full time. But his principal, Mr. B. C. Williams, warned him that his temper was so irritable that he would never

succeed in that branch of the legal profession. Hence he determined to go to the bar.

Mr. Justice James Allan Park had so extraordinary a resemblance, both in appearance and in manner, to George III that many believed—as some still do—that he was the son of that King. But his Scottish origin and some other circumstances render that conjecture improbable. He was so obtrusively religious that he got the nickname of *Saint* James Allan Park. Then, to distinguish him from Baron Parke (Lord Wensleydale), they were called respectively St. James's Park and the Green Park.

In 1856 Baron Parke was created a life-peer, a constitutional novelty. But the Lords resolved that such a peerage could be only a title of honour and could not entitle the grantee to sit and vote in their House. Lord Cranworth, who had misled Lord Palmerston into making the grant, was hotly vilipended by the other Law Lords and by all the Tory party. The secret reason of their vehemence was a fear that the Prince Consort had a design of bringing scientific and literary men into the House of Lords as life-peers.

Lesser Legal Lights.

Probably the most learned lawyer of my time was Serjeant Manning. He always had ready at command a mass of authorities; but he was never able to see which of them were really relevant, or what points would be untenable. He became Queen's Serjeant, and ultimately Antient Serjeant. In the latter position it was his privilege to be summoned to Parliament and to sit on the woolsack with the judges.

Mr. Thomas Flower Ellis, Lord Macaulay's most intimate friend, was a man of high accomplishments. His speech in *Achilli* v. *Newman* was very greatly admired as a splendid display of sarcasm. Yet he once said to me, 'I have been on the Northern Circuit for nine years; and have thus gone eighteen circuits, which have cost me £100 each. But I have never held a single brief at any of them.'

A curious fate befell old Mr. Koe, Q.C., who had been secretary to Jeremy Bentham. When Queen Victoria visited Lincoln's Inn Hall, he was suddenly called in to explain to her the roof and Watts's great fresco of the 'School of Legislation.' He being in failing health, this unexpected task upset him; he took to his bed and died.

The historian Kinglake, when in practice at the Chancery

Bar, had the good fortune to form a friendship with the manager of the Chancery department of the great firm of Gregorys; a connexion which placed him on the high road to a very lucrative practice. But the war with Russia broke out; and he devoted his Long Vacation to visiting the Crimea. On embarking to return to England he was attacked by the Crimean fever; and had to be put into hospital at Malta. When he did get back to London he found that he had lost his practice. Hence the world gained his History.

I remember an inquiry being held into a charge of indecent conduct in the Temple that was made against a prominent lawyer. The result was that he was permitted to remain a member of his Inn, but only on condition of never again appearing in Court. He thus had to confine himself to drafting and to appearing at arbitrations.

James Russell, Q.C., who reported Lord Eldon's decisions in Chancery, wrote in the Annual Register for several years; and gave it a violent Tory bias. He was famous for three characteristics: his penuriousness, his drunkenness, and his filthiness. His clerk once announced to him, whilst talking to his pupils, that the laundress had come for his dirty linen. To this embarrassing message he mustered up courage to reply: 'Last week I had *no* dirty linen.'

COURTNEY KENNY.

MAIN FEATURES OF SCANDINAVIAN LAW.

UNTIL quite recently, Scandinavian Law rested only to a very limited degree upon positive Statute Law. There are, of course, some codes of ancient law extant, those from Denmark and Norway of 1683 and from Sweden of 1734 being the most important. Even at the time they were published, however, these codes were far from being exhaustive. Many subjects were entirely absent from their pages, while those they did discuss frequently omitted quite general rules to be found in more recent continental works, *e.g.*, in the French 'Code Napoléon', in the German 'Bürgerliches Gesetztbuch' and in the Swiss 'Zivilgesetzbuch.' Many of these codes were quite 'casuistic' in form, merely giving precepts in certain isolated cases of practical importance, and leaving it entirely to the acumen of those whose duty it was to interpret the Law to discover by analogy or other means a general rule from these disjointed precepts. Furthermore, it was obvious that on account of the progress of civilization many of these old legal precepts must have lost their original importance.

In many subjects—the 'Law of Contracts' and the 'Law of Torts', for instance—Scandinavian Law has been evolved in much the same way as British 'Common Law', through the daily practice of the Law Courts. Indeed in many other directions Scandinavian Law offers points of similarity with that of Great Britain and America, in that it has been essentially national in feeling and having been evolved independently of Roman Law. In Scandinavia the latter has never been accepted as current law, as it was in Germany until 1900, when the Code of Civil Law (which so plainly bears the stamp of its Roman source) came into force. It would thus be a fallacy to imagine the Scandinavian countries mere dominions of their powerful neighbour in the south. They are, legally as well as politically, entirely separate countries.

The actual influence which German Law undoubtedly has exercised upon the Scandinavian Law is apparent mainly in the Science of Law, and one of the peculiarities which the Scandinavian countries—Norway and Denmark in particular—share with Germany is that the *Theory of Law* has played so great a role in making and developing our law. This work does not

confine itself, as do many British and American textbooks, to giving merely a well-arranged, systematic array of precedents and the legal conclusions appertaining thereto, but in many cases adds quite exhaustive advice upon the line to be taken in cases where positive legislation fails. These scientific rulings have often formed the basic foundation of subsequent codification.

As regards this point there can be no doubt that Northern Science of Law has derived much benefit from these illustrious Roman-Germanic influences and that Roman Law has certainly set its mark upon certain sections of our law, particularly upon our laws on contracts and torts. But our jurisprudence has been by no means subjugated by this all-pervading Germanic influence. This is above all due to the prominent work of a single man—the Danish Blackstone I might call him—Anders Sandöe Örsted, who in the beginning of the 19th century founded the entire Danish Law on a national and (what means about the same) quite realistic base. By the further development of our law we have also in an ever-increasing degree profited from the valuable influences of French and more especially from British law which offer so many points of similarity with our own. One of the advantages of being a small nation—provided that the nation does not hold priggish ideas—is that it is more open to and able to accept influences from all parts of the world.

Nowadays, however, quite comprehensive codification has taken place, the main object for this being the wish to create *laws common to all Northern nations.*

The Northern countries, both politically and nationally, are entirely separate and independent kingdoms. For several hundred years—from 1380 to 1814—Denmark and Norway were certainly united as one empire, but this union was dissolved more than 100 years ago when Norway was surrendered to Sweden. The relations between these two countries then assumed the character of a mere personal union. There was one king common for both countries, but there was no legal connection between them. In 1905 even this union was dissolved.

To these three independent Northern Kingdoms two other countries have lately been added: *Iceland*, which, in the 14th century, was with Norway united with Denmark, and which maintained her connexion with Denmark even after Norway had seceded. In 1918 Iceland became a free and sovereign country, connected only with Denmark by one common King. Secondly *Finland*, which, after having been united with

Sweden until 1809, in that year became a dependent state of Russia and remained so until during the Great War she extricated herself from this union and formed an independent Republic. The mutual legislative agreements between the Northern countries apply mainly, however, only to Norway, Sweden and Denmark, though some of the laws, in practically unaltered form, have been adopted by Iceland also, and since becoming an independent State Finland has also taken active part in the efforts to establish mutual legislative measures in the Northern countries.

This work, for which Science has paved the way and which is so greatly assisted by the Congresses of Northern jurists—which have met regularly ever since 1872—is due primarily to *purely practical needs.* Easy communication between the Northern countries would be retarded by divergencies in their laws, and, *vice versa*, would be assisted by the greatest possible similarity.

A beginning was therefore made with a legal territory of quite especial importance to trade, where conspicuous national characteristics do not play too great a part, the initial effort resulting in the *Law of Exchanges.* This Act, exactly similar on every point, was successfully passed in all three countries on the same day, *viz.*, May 7, 1880, and has proved of immense advantage not only as regards relations and communication between these countries mutually but also between them and the world outside. At the conferences at The Hague in 1910 and 1912, with the object of establishing an international Law of Exchange—which would be of immense importance to the general intercourse—the close legal unity of the Northern countries enabled them to act as one unit to form the 'Bloc Scandinave', which thus commanded a vote of considerably greater weight in the international Concert than would have been the case if each country had acted independently.

The next result of this Northern legislative work was the *Maritime Act*, passed in Denmark in 1892. Next came the *Cheque Act* of 1897. In view of the nature of their character it follows that both these laws require not only inter-Scandinavian but also international conformity.

Since the commencement of the present century much progress in this mutual work has been made. In 1906 the practical and important *Sale of Goods Act* was passed, and in 1917 followed the Acts on *Contracts*, on *Commission, Commercial Agencies* and *Commercial Travelling*, and on the *Hire and Purchase System.* There are, I know, certain small divergencies in the actual

wording of these laws, but in the main they are identical in all Scandinavian countries.

Our efforts to establish rules in common applying to all questions of personal property do not, however, stop here. Only quite recently, thanks to the co-operation of various Northern Commissions, a Bill has been drawn up dealing with the question of *Insurance Policies.*

In latter years our efforts have also been directed into an entirely new field: that of *Family* and *Personal Rights.* Though this question might appear to offer quite exceptional difficulties—as it is just in questions of this kind that national idiosyncrasies and the inclination to maintain them are especially to the fore—our work in this field exhibits quite creditable results.

We have succeeded—in Denmark in 1922—in passing a *Marriage and Divorce Act* which is mutually identical in form in all the main issues. A Danish Act of 1925 on the *Legal Effects of Marriage,* drawn up by a mutual Northern commission, agrees on most points with a previous Swedish Act relating to the same question. The corresponding Norwegian Act has, however, not yet been carried through. This is also the case with the Act of 1922 relating to *Minors and Guardians.* Whereas on a more special question, that of *Adoption,* a mutually equivalent law has been passed in all three countries. It is our intention to carry on this work in other questions concerning private rights. It is perhaps not possible that complete unanimity will be attained in all these rather intricate legal questions, but everything will be done by means of mutual conferences and commissions to smooth out the differences and divergencies between the law of the various Northern countries.

As far as the general wording of these laws is concerned—as I said before—they bear the impress of those especial features peculiar to Scandinavian Law in general. They do not claim to be exhaustive, but deal solely with regulations of practical use which can be instituted without raising too many obstacles in the way of further legal development. They do not—as is the case with the German Code, for instance, commit themselves to giving precepts upon the importance of 'want or failure of consideration' in agreements, and even in cases which they do touch upon, the regulations are formed with such elasticity that there is still plenty of room for free judicial interpretation. In practice our judges—in the same way as the Roman judges of old—will often find an opportunity, by means of the so-called 'restitutio in integrum,' to circumvent a legal precept, *e.g.*, in

cases where common sense leads them to consider the given precept inapplicable.

Furthermore, as to the actual *contents* of the law, there are several provisions aiming more at the fulfilment of natural justice than at the establishment of unalterable general rules which might well occasion injustice in individual cases.

I refer here mainly to the so-called 'undue influence' clause, which, as the name implies, is one of the most important acquisitions we have transplanted from English law—even though there is a sort of parallel in the German Code of Civil Law (§ 138). In the Danish text—which is naturally the easiest for me to take—in Paragraph 31 we find the following:—'Should anyone profit by another's need, imprudence, stupidity, inexperience or dependent position to gain or stipulate advantages completely disproportionate to value received, there being given in exchange no corresponding remuneration, the person thus imposed upon shall not be considered legally bound by his or her undertaking.' We also find (§ 30) that not only shall such an undertaking be considered null and void in cases where the recipient has obtained the promise under false pretences, but also (§ 33) a party will not be entitled to take advantage of an agreement, if doing so would be at variance with the rules of ordinary honesty, because of special existing circumstances, of which he must have been fully cognisant, at the time the proposals were put before him.

The same basic idea is shown in our *Tenancy Laws*—the most recent of which was that of April 1, 1925—which were called into being by the impossible conditions of life during the war, and possibly to an even greater extent by the conditions obtaining after its close—and also in the special *Hire-Purchase Act*.

Previously our laws on this question were open to much misuse, *e.g.*, in cases where the buyer agreed that the moment he failed to pay even the smallest instalment, the object bought should be returned unconditionally and possibly without the refunding of a penny of all the instalments already paid, even though this amount might actually far surpass the true value of the article in question.

The new law appears then as a law of social protection—aiming to protect the buyer from abuse when entering upon agreements with a salesman, usually the stronger party, who was guilty of such sharp practices.

The law now provides that a trifling irregularity in fulfilment of the contract will not empower the seller to recover the article

purchased, but lays down that any such breach must be of a far graver character—such, for instance, as the non-payment of instalments until long after the pre-arranged day of payment, or the complete failure to continue payments, the amount owing still forming an essential part of the total purchase price. Should the salesman wish to recover the object sold, an investigation of the facts will be undertaken and matters settled fairly. Our object is to place the seller in the same position as he would be if the sale had been properly completed, and not to allow him any special advantage by permitting him to reclaim the object sold because it has not been fully paid for.

A similar idea is also expressed in § 36, which sanctions the reduction of the so-called *conventional penalty* in such cases, for instance, as when a contractor has failed to complete a certain work by the time agreed upon, should the circumstances of the case make it plain that it would be unjust to make him pay the whole amount.

In the next section similar rules apply to cover such cases as when, for example, a person has acquiesced that should an agreement lapse on account of breach of contract on his part, he will nevertheless fulfil his original undertaking. The object of this policy is to nullify all such unreasonable clauses as those often found in leases, wherein a tenant, who has broken the articles of his lease and has therefore been ejected, is still liable for rent for the whole of the remaining period, the rent being claimed in spite of the fact that the tenant no longer occupies the premises in question and that the lease must therefore be considered cancelled, and also quite regardless of the fact that the owner may have re-let his property upon similar or even more favourable terms.

Certain restrictions are also established in regard to the legality of so-called *competition agreements* or *competition restrictions*. Section 38 of the *Act on Contracts* sets forth that, should anyone have undertaken, for competitive reasons, not to commence or carry on business or other occupation of a certain description, or to accept a position in the proscribed line of business, and should it be deemed that the agreement (as regards time, place, or other circumstances) goes beyond what is really necessary to protect the interests of the other party, or limits to an unreasonable degree the liberty of the first party to obtain employment, the latter shall not be held to the letter of his undertaking. Unrestricted liberty to carry on legitimate business is thus fully secured.

To the above category may also be added some special clauses

drawn up for the protection of persons who, whilst employed in a certain line of business, have signed agreements of this kind to apply after the cessation of their existing employment. Our Danish law now lays down that should an employee be dismissed without sufficient reason, or should he leave his position because his employer's failure to fulfil his obligation has given him due and sufficient reason for so doing, his agreement with his employer will automatically terminate.

The equivalent section in Norwegian law declares without further preamble that all agreements between employer and employee restricting, on competitive grounds, the liberty of the latter to carry on business after cessation of his employment are to be null and void, excepting only in cases where the employment in question has given an employee special knowledge of business secrets or of the customers of that particular business.

There are, in our Legislature, many '*social-political*' *regulations*, as you might call them, of this kind, aiming at the protection of business subordinates. For example—in addition to those various protective measures relating to industrial workers, which now, thanks to the Washington Conference of 1919, are receiving international sanction—there are special regulations relating to apprentices or servants and dealing with board, lodging, and treatment in case of illness. Two such Danish laws were passed in 1921.

The great liberty accorded to a judge in his interpretation of the letter of the law is nowhere more clearly expressed than in the Danish Infants Relief Act of 1922. In the sections 63 to 65 we find that, while children and lunatics are held just as responsible for their harmful actions as adults and sane persons, a judge is empowered to reduce the amount claimed for damages, and in fact to cancel such damages altogether, if it seems reasonable to do so. He is empowered to take into account the backward development in a child, the state of mind of an adult, and the general nature and circumstances of the case. He may consider in addition the relative ability or non-ability of the wrongdoer or wronged party to bear the loss claimed and whether there is any reasonable prospect of obtaining damages elsewhere. In certain cases a minor or lunatic may thus be released from payment of damages because the injury or damage was suffered by a person rich enough and hence better able to bear the loss than the poor offender himself.

Finally, if a person, by reason of his lunacy or inability to act with sanity, has undertaken certain engagements, it is provided in our law that these engagements shall be considered null and

void, even though the other party may have acted in all good faith. This point is, I believe, at variance with British law. In our case, however, it is laid down that the other party may be granted compensation for any loss incurred by the agreement.

If we now leave the laws on property and, turning to the laws on *Persons*, consider the most important branch—that of *marriage*—we see that there are two main features especially characteristic of modern Scandinavian Law. The first is the great *freedom* of the parties and the second the complete *equality* of the legal rights of both sexes.

As far as the former is concerned it is obvious that the two persons will usually be at liberty to choose whether they will marry or not. On the other hand, however, there may be cases calling for some restriction of this liberty—reasons of health or *eugenics*, which necessitate our forbidding the union of those suffering from infectious venereal diseases, epilepsy, or similar affections.

A general restriction of this kind will be found in *Swedish* law, which provides, however, that special permission to marry may be obtained in certain special cases.

Norwegian law prohibits categorically all questions of marriage by or with those suffering from syphilis, but as far as concerns those suffering from any other infectious venereal disease or from epilepsy or leprosy, it is held that marriage is forbidden unless the intended spouse has previously been made fully acquainted with the sufferer's condition and both parties have received oral instruction from a medical man as to the danger of the complaint and its treatment. The latter provision, that of *no prohibition but full enlightenment*, is also the *Danish* view on this point.

Freedom of agreement is, however, even better exemplified in questions of *dissolution* of marriage. Here we find that if both the parties are *in agreement* they are at perfect liberty to dissolve *cohabitation* and commence a period of non-cohabitation when they please. When a certain time has elapsed (from one year to eighteen months) they may, if both are still agreed, obtain absolute *divorce*.

One party alone can obtain a decree 'separatio a mensa et thoro' only if, as it is expressed in Danish law, 'their marital relation because of complete incompatibility of temperament may be considered irreparable,' unless the disharmony in question is due mainly to the plaintiff's own fault. When the couple have lived apart for a certain time, which varies from one to two and a half years in the various Northern countries,

either party may claim for a decree 'nisi.' This is also the case if they have lived apart for several years without formally applying for a judicial separation.

The difficult question of the *custody of the children* in cases of dissolution of marriage is decided always by considering first of all the question of what would be *most to the children's own good.* If the parents are agreed, settlement will usually be made in accordance with their wishes, provided always of course that these are not at variance with the children's advantage. But if the parents are not agreed, this question will be settled with due regard to what would be right and reasonable as far as the children themselves are concerned. Only in cases where both parents are adjudged to be equally competent to bring up the children will regard be given to the question of whether one or other of the parties is mainly responsible for the dissolution. In such cases the care of the children will be awarded to the other party. Children of under two years of age will, however, only in very special circumstances be removed from their mother.

The almost identical *equality of rights* enjoyed by married couples is a natural consequence of the political equality which women in Scandinavia have now acquired. This *personal* equality is clearly evident in the fact that the wife shall not be subordinate to her husband in any single respect. Consequently, in principle, she enjoys exactly the same right as her husband to decide, for example, where their future home is to be. On the other hand, however, it is also the duty of both parties to the best of their individual ability to contribute to the maintenance of each other and of their offspring. Parental authority over the children belongs to each of them in unity, father and mother being exactly equal in this respect. It is only as regards actual guardianship (as to the economic status of the children) that there is a certain difference. The father is considered legally the natural economic guardian of a legitimate child, and only when the father dies, or is declared irresponsible for his actions and hence unable to fulfil the duties and responsibilities of a guardian, or his parental authority is taken from him, will the mother assume the complete rights and duties of a guardian.

It is, however, more especially in questions of *property rights* that complete equality of a wife with her husband reveals anything new. This Act, which in Denmark became law in 1925, establishes the general rule—provided always that the wedded pair have not already drawn up a deed of settlement or made some special arrangements, such as a deed of separate property—*community of goods but with separate powers of disposal*—that

everything possessed by the married couple at the time of their marriage, or acquired by either of them later, shall belong to them both in common, but as long as both are alive, either husband or wife is at perfect liberty to dispose of their part of the common property, if it is so desired.

There are, of course, certain exceptions: House property, for instance, which serves as the common family residence, or in which their trade or living is housed. In this case any disposal will usually require the consent of the other partner, the same rule applying in the case of all personal property in the shape of furniture or fittings in their common home, the necessary tools of the other party, or articles necessary to the children's personal needs. The married couple will also enjoy certain powers of attorney to act on each other's behalf. During cohabitation each consort is thus legally empowered, in the name of both, to enter with a third person upon any undertaking necessary to the ordinary upkeep and maintenance of their home and children. The same legal right is enjoyed by the wife—in conformity with their social position and income—with regard to her special needs, such as medical advice and attendance, necessary clothes, etc.

The practical importance of this 'Common Property' arrangement is, however, even better exemplified at the dissolution of a marriage, either by the death of one of the parties or by divorce. When this takes place the other or his heirs will automatically become entitled to a half-share of their common property at the time of said death or divorce. Further, in conformity with the Act of 1926, should either die, the survivor will inherit a certain share in the deceased's half of the property. If there are direct heirs, this share is of one quarter. If there be no direct heirs but there are other near relations (father, mother, brothers sisters or nephews and nieces), a half-share, and only when there are no such heirs or relations, the whole property. Ample scope is also given for the survivor, by means of what I might call 'Prolonged Possession Act'—in German, 'fortgesetzte Gütergemeinschaft'—to continue in possession of the property together with the heirs, so that the surviving partner may continue to enjoy full benefit of the property for the rest of his (or her) life.

The human and social spirit so evident in all branches of Scandinavian law is also exemplified in the decisions made with regard to so-called *illegitimate children*. These rules have, however, not yet been formed into one common law for the various

Scandinavian countries, and are therefore still slightly divergent in each.

According to the *Norwegian* Act of 1915 a child of unmarried parents usually enjoys *the same legal position with regard to its father* as to its mother, provided that the man named really is the parent of the child in question.

In order to substantiate this supposition, it is necessary to *prove* in Court: that he has had *marital connexion* with the mother; that, in the natural order of things he might well be the father, *the Court finding no reason* to suppose that the mother has had similar connexion with other men, or that there are special circumstances which make it doubtful whether the man named really is the child's true father.

The last clause is especially noteworthy, in that it establishes that the Court is never in a position to pronounce a sentence of paternity in cases where there is the slightest doubt. An illegitimate child may assume *the family name* of either its father or mother, and upon his father's identity being legally established will enjoy the same legal *rights of inheritance* from his father as a legitimate child, but, as a rule, he will not enjoy the same 'aasaetesret,' which is the Norwegian word for the right to inherit the undivided landed property of his deceased father, at the same low scale of tax as is allowed to legitimate children.

In *Sweden*, in conformity with the so-called '*Engagement Children*' *Act* of 1917, which refers to children born of parents who were admittedly engaged when the child was born, such children are entitled to assume their father's name and inherit his property in exactly the same way as a legitimate child. As regards other illegitimate children, however, it still holds good that their legal rights will be decided by the status and position of the mother and that they will have only a limited claim upon the father.

This is essentially the view held in *Danish law* also, but here more attention has been given to the question of assuring to illegitimate children *proper support and education*—a matter of far greater practical importance to the majority of such children than the often merely theoretical right of inheritance.

This question of support and education is as much in the interests of humanity and society as it is in the interests of the child itself. Indeed it is probably more so. Insufficient support and defective education of these large numbers of illegitimate children is in reality a menace to society.

Our statistics show plainly how large a percentage of profes-

sional criminals are recruited from the ranks of 'illegitimate' children, and it is for this reason that our laws make the father of an illegitimate child liable for such relatively large maintainance and monthly allowances for education—and, what is of still more importance, our law prescribes that these amounts shall be paid *in advance* by the Crown on his behalf. As, however, in many cases he is unable to refund this public outlay, a very large share of it must be defrayed by the public purse, and the amounts actually expended in this way are by no means insignificant. But we think it to be a far better social policy to use this money to make useful citizens of our youth, than to erect prisons for our adults.

These efforts are but a link in the chain of *social legislative measures* which in Denmark have developed so rapidly.

There are numbers of other new social Acts, such, for instance, as those relating to the Relief of Unemployment, to Old Age and Invalid Pension Funds, which it is not possible for me to enlarge upon here, but all of which, I venture to say, have contributed greatly to the eradication of social inequalities and hence to the realization of the truly *democratic* spirit and practice of the Danish nation.

To these Acts must also be added the socializing efforts put forward in our new *Farmers Allotment Acts* of recent times. In Denmark, where almost every inch of the country is fully utilized, the question is one of great difficulty. But by selling public property and more especially by expropriating and cutting up the great entailed estates which have existed in our country until a few years ago, considerable areas of land have been released and distributed in small holdings, the Crown having granted quite considerable sums in loans to assist in the establishment of such holdings. These Allotment Acts have proved not the least important factor in building up the present solid foundation of our social organization, and will undoubtedly enable it to weather many future storms and finally to realize the words of the great Danish poet—a man possibly known in England and America, I refer to Bishop *Grundtvig*—who hoped that soon 'Few would have too much and still fewer would have too little.'

H. Munch-Petersen.

THE LEGISLATIVE COMPETENCE OF THE DOMINIONS.

THE report of the Imperial Conference of 1926 foreshadows the appointment of special sub-committees to deal with various legal questions which were too technical for detailed discussion in a political gathering, and among the topics selected for consideration is the question of the restrictions imposed by the existing law upon the legislative competence of the Dominions and colonies. Pending the nomination of these committees it seems desirable that some effort should be made by those interested to estimate accurately the effect of the present laws limiting the power of the Dominions, and to consider how far the modern development of the Empire calls for alterations in the text of the positive law. The report of 1926 is chiefly concerned with questions of constitutional practice, but practice can only move within the limits laid down for it by law, and it would seem that the time has now arrived when these limits have become too narrow. For the most part they are the work of an earlier age and the expression of an earlier conception of imperial relations. The technical problem with which we are now faced is that of making the text of the law correspond with the political reality.

The subject-matter of this article therefore divides itself naturally into two parts, and we must begin by examining the extent to which the Legislatures of the Dominions are inferior to the Imperial Parliament in their power of enacting law. They are not the delegates of Westminster; *Hodge* v. *The Queen* [1] was an *ex cathedra* condemnation of Dicey's earlier view that colonial Legislatures were legally analogous to railway companies, and it is clear that they share in the general sovereignty of Parliament. At the same time their sovereignty is limited by law, abhorrent though the notion of a limited sovereignty may be to jurists of the Austinian school.

For the moment I shall not pause to consider in detail the special problems presented by the structure of the two federal Dominions, Canada and Australia. In these two cases the general mass of law-making power is carefully distributed between the federal and the local Legislatures, and the parties

[1] (1883) 9 A. C. 117.

cannot disturb this distribution either unilaterally or by joint action. In the case of Australia the constitution can be altered by a national referendum, but in Canada there is no power within the Dominion to amend the original scheme, and any readjustment requires the intervention of the Imperial Parliament. No change has in fact taken place in the distribution of legislative power in Canada since the enactment of the constitution sixty years ago, and it is probable that the Imperial Parliament would be reluctant to intervene unless the demand from Canada was substantially unanimous.

Putting questions of federal government on one side, the existing restrictions on the legislative competence of the Dominions may conveniently be divided into those created by common law and those arising from statute. The statutory restrictions may be further divided into those which are of general application, and those which apply only to particular Dominions or colonies.

At one time a somewhat vague theory prevailed which declared that the colonies were unable to legislate in a manner at variance with the laws of England. Blackstone says that in the plantations 'provincial assemblies are constituted with the power of making local ordinances not repugnant to the laws of England.' [2] Since almost every statute of general importance is presumably intended to effect some alteration in the law, it is not easy to understand exactly what this doctrine meant, and I am not aware of any reported case in which colonial legislation was actually pronounced to be invalid on this ground. Whatever the theory may or may not have meant, it was at any rate of sufficient importance to create some uncertainty, and this uncertainty led to the passing of the Colonial Laws Validity Act of 1865. Since then the doctrine of 'repugnance to the laws of England' has had no more than a historical interest.

A common law restriction of more importance is that which affects legislation dealing with the royal prerogative. Upon this point no general doctrine has been authoritatively laid down, but the cases seem to indicate a fairly clear and logical distinction. In so far as the exercise of the royal prerogative is delegated to the colonial governor for the internal administration of his particular territory, it can be abolished or abridged by a statute of the local Legislature. For example, the Crown's immunity from legal process and the Crown's priority over competing creditors have been dealt with by numerous colonial

[2] Introduction, section iv.

statutes, and the validity of this legislation is beyond dispute. On the other hand, where the prerogative is exercised by the governor for imperial purposes it is beyond the reach of the colonial Legislature. If, for example, the governor is required, either by statute or by his instructions, to reserve certain classes of bills for the royal assent, it is clear that this duty of reservation can be subject to no local interference. In general, it is probably true to say that the colonial Legislature can do nothing which would have the effect of interposing any barrier between the governor and the Crown, or limiting his discretion in dealing with the home Government.[3]

For the same reason it is even more obvious that the colony cannot do anything which would limit the exercise of the royal prerogative by the Crown in England, even in matters relating exclusively to the colony. This is the principle of the various decisions upon the competency of colonial statutes purporting to limit the right of appeal to the Privy Council.[4] In so far as the right of appeal is a privilege of the subject or in so far as it has been created by local statute it can be abridged or abolished by the colonial Legislature. But the colony has no power to limit the exercise of the royal prerogative in England, and it therefore cannot prevent the King from granting 'special leave' to appeal, nor can it debar the litigant from petitioning for the exercise of this discretion in his favour. On the other hand, it is in many cases possible for the local Legislature to negative the practical effect of the judgment by enacting that the law shall be the reverse of that laid down in the report of the Judicial Committee.

Another common law difficulty arises over the question of the validity of 'extra-territorial' legislation in the Dominions and colonies. It seems clear from the decision in *Ashbury* v. *Ellis*[5] that there is nothing to prevent a colony from attaching civil consequences within its jurisdiction to acts transacted beyond its borders, and I have elsewhere[6] given my reasons for thinking that there is no logical reason for denying the competence of colonial Legislatures to attach penal consequences within their own territories to criminal acts committed abroad, subject to the restrictions which are in practice observed by the Imperial

[3] This is the principle involved in the decision of the *Initiative and Referendum Case* [1919] A. C. 935, though the text of the British North America Act was sufficient for the determination of the question actually at issue. See also *Taylor* v. *Att.-Gen. for Queensland* (1917) 23 C. L. R. 457, at 474.

[4] Compare *Théberge* v. *Landry* (1876) 2 A. C. 102, with *Cushing* v. *Dupuy* (1880) 5 A. C. 409.

[5] [1893] A. C. 339.

[6] *Canadian Bar Review*, i. 338—350.

Parliament in dealing with such matters. This view is supported by the much higher authority of the late Sir John Salmond.[7] On the other hand, some expressions used by Lord Halsbury in the case of *Macleod* v. *Att.-Gen. for New South Wales*[8] have given rise to a theory that in no cases can a colony punish criminally an act committed abroad, and this view commands the distinguished support of Professor Berriedale Keith,[9] while it has been judicially adopted by the New Zealand Court of Appeal in the case of *R.* v. *Lander.*[1]

This question is too intricate to be reviewed again in the space available, and the references given will enable the reader to form his own views upon the merits of the controversy. If I am correct in thinking that a colony can punish crimes committed abroad, then a further difficulty arises as to the extent of this power. No country attempts to legislate extra-territorially except for its own subjects, but it is obvious that the Imperial Parliament can deal with all British subjects in any part of the world, while it may be questionable whether a colony can legislate for British subjects, except for its own 'citizens' or, at any rate, for those who are normally resident within its jurisdiction. We can be certain of nothing except that the whole matter is uncertain, and clearly the question calls for an unequivocal legislative solution.

The most important statutory restriction upon the general powers of dominion and colonial Legislatures is that contained in section 2 of the Colonial Laws Validity Act of 1865,[2] which runs as follows:—

> 'Every colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

The next section repeals the old doctrine of 'repugnancy' by the following words:—

> 'No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of

[7] *Law Quarterly Review*, xxxiii. 117—131.
[8] [1891] A. C. 455.
[9] *Journal of Comparative Legislation* (1923) 3rd Series, v. 274.
[1] [1919] N. Z. L. R. 305.
[2] 28 & 29 Vict. c. 63. The section practically re-enacts 7 & 8 Wm. 3, c. 22.

England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.'

As a matter of history the statute was the result of a dispute which arose in South Australia in 1861, one of the local judges having attempted to assert in an extreme form the doctrine of invalidity on the ground of repugnancy. Upon reference to England the law officers affirmed the doctrine in the abstract, but admitted the impossibility of defining it, and were of opinion that cases involving its application would not be likely to arise in practice.[3] The statute was therefore passed as an enabling Act, with the object of releasing the colonies from whatever fetters the theory of general repugnancy might be deemed to involve. At the same time it was clearly based upon a theory of Empire which assumed that the colonies would always remain subject to the general control of the Imperial Parliament and should be content to legislate within such limits as Westminster might from time to time deem fit to prescribe.

In practice the restrictions thus imposed have proved to be of considerable importance, for there are a large number of English statutes which expressly extend to the Empire as a whole, with the result that the ground which they cover is removed from the jurisdiction of the colonial Legislatures. A well-known example is to be found in the Copyright Act of 1842, which prevented the Legislatures of the Empire from dealing effectively with copyright until liberty was granted by the Act of 1911. In the same way it has been found necessary to grant the colonies special permission to enact their own marriage laws, and in various other matters special exceptions have been made by statute to the general rule laid down by the second section of the Colonial Laws Validity Act. But this is clearly a very unsatisfactory method of handling a question of such high constitutional importance, and I would suggest that the time is now ripe for laying down a new rule which will not call for a multitude of exceptions.

Of the restrictions which are still operative the most important are those which relate to legislation dealing with Admiralty jurisdiction and merchant shipping, and the Conference report of 1926 promises that these questions shall be specially dealt with by a technical sub-committee. In an earlier number of this *Review*[4] I have tried to illustrate the confusion and practical

[3] The history of the South Australian controversy is more fully set forth in Keith's *Responsible Government in the Dominions*, vol. i. pp. 402—423.

[4] xli. 423—432.

inconveniences which arise from the present state of the law upon these matters, and in this article I shall rather aim at examining the question in the light of the political principles suggested by the report of the Imperial Conference.

According to the older conception of the Empire it was considered as being beyond dispute that all questions of maritime law and jurisdiction were exclusively matters of imperial concern. The Vice-Admiralty Courts scattered throughout the world were regarded as mere local agencies of the High Court of Admiralty in England. Their operations were entirely beyond the reach of the colonial Legislatures, and the law which they administered could only be declared at Westminster. In 1890 the colonies were given leave to establish Admiralty Courts [5] of their own, but the permission thus granted was jealously restricted. A colony cannot endow its Admiralty Court with any greater jurisdiction than the Admiralty jurisdiction exercised by the High Court in England, and in the case of *The Camosun* [6] the Privy Council, overruling three Canadian tribunals, even held that the colonial Courts could not entertain an equitable defence in an Admiralty proceeding. The statute does not make it clear whether the colonies are at liberty to define the law to be administered in their Courts, but the Appellate Division of South Africa has held that a Court sitting in Admiralty must administer English law in cases where that law conflicts with the law of South Africa.[7] Section 2, sub-section 3 (a) of the Act provides that English statutes referring to Admiralty jurisdiction are to be read in their application to the colonies with the substitution of the name of the particular colony for the words 'England and Wales.' Whether this last provision applies to English statutes passed after 1890 is a matter of dispute, and at the time of writing the question is awaiting decision by the Privy Council in a case of *The Woron*, on appeal from the Exchequer Court of Canada. It is further enacted that rules of procedure made by the colonial tribunals can only take effect when approved by the King in Council. The statute as a whole is clearly based upon the principle that in matters of Admiralty jurisdiction the colonies are to be closely dependent upon Great Britain, and

[5] Colonial Courts of Admiralty Act (53 & 54 Vict. c. 27).
[6] [1909] A. C. 597.
[7] *Crooks* v. *Agricultural Union* [1922] S. A. L. R. 423. Most of the questions which could occur are covered by the Merchant Shipping Acts, but possibilities of conflict arise in cases of employers' liability and priorities among competing creditors.

any action which they are allowed to take must be subject to strict supervision from above.

The law to be administered by the Courts of Admiralty is contained in the Merchant Shipping Act of 1894,[8] the Sea Regulations of 1910, and a number of later statutes. For the most part it constitutes a single code applicable to the Empire as a whole, and the third part of the Act of 1894, which deals with emigrant ships, is placed entirely beyond the reach of colonial legislation. With regard to the rest of the Act, the colonies are permitted by sections 735 and 736 to legislate for ships registered within their jurisdictions and to regulate their own coasting trade, but all statutes must be reserved for the royal assent, and those affecting the coasting trade must not discriminate against British shipping or violate international obligations. The liberty conferred is obviously very restricted, for it does not even grant to the Dominions a general control over their own territorial waters.

Without going into further details it is obvious that this legislation is conceived in the same spirit as the Colonial Courts of Admiralty Act of 1890. That is to say, it assumes that the general subject of maritime law is exclusively a matter of imperial concern, and that nothing can be safely permitted to the colonies but a minute power of local regulation.

More recent legislation indicates a change of view. The Maritime Conventions Act of 1911,[9] which altered the rules relating to contributory negligence and personal injuries, contained a clause providing that it should not take effect in the Dominions, leaving them free to adopt it by the act of their own Legislatures. For the first time in the history of this matter a distinction was thereby drawn between the Dominions and the minor colonies. The new principle finds further expression in the Maritime Conventions Act of 1914[1] and the Carriage of Goods by Sea Act of 1924.[2] Two more international conventions affecting maritime law are at present awaiting legislative action, and the principle now seems to be accepted that in future alterations of the law are not to be imposed upon the Dominions without their consent.

At the same time it must be remembered that these new liberties do not enlarge the general limitations placed upon the

[8] 57 & 58 Vict. c. 60.
[9] 1 & 2 Geo. 5, c. 57, s. 9.
[1] 4 & 5 Geo. 5, c. 50, s. 24.
[2] 14 & 15 Geo. 5, c. 22. In this case there is no express exemption of the dominions, but the effect of the Act is limited to voyages beginning in Great Britain and Northern Ireland.

Dominions by the Acts of 1890 and 1894. The Dominions are now permitted to refuse their assent to new changes in the law initiated by Great Britain, but they have no general power to make new laws according to their own discretion.

I will not attempt to take up space by giving further examples of the effect of the Colonial Laws Validity Act in limiting the self-government of the Dominions. The question of maritime law is the most important, and is sufficient to illustrate the ideas which inspired the legislation of the nineteenth century. By common consent these ideas are now obsolete, and the problem before us is that of adjusting the law to the political realities of the present day.

The change which has taken place consists in the gradual abandonment of the idea that the unity of the Empire can only be maintained by the exercise of superior authority at the centre in London. The maintenance of unity remains as essential as it was before, but we have come to take a different view of the means by which it is to be preserved. We now believe that the voluntary co-operation of free Governments is a better way of maintaining unity than the legal control of a number of dependent Governments by a common superior. The Conference of 1926 affirms this doctrine as a principle of political action. The problem for lawyers is to find a means of expressing the principle in terms of law.

If we have abandoned the idea of a general control by a common superior it would seem to follow that the first thing to do is to place the Legislatures of the Dominions as nearly as possible upon the same legal footing as the Imperial Parliament. The qualifying words are necessary, for any attempt to create complete legal equality would only produce confusion without in any way furthering the cause of a legitimate autonomy. For example, it is clearly necessary that the Imperial Parliament should possess an ultimate reserve of unlimited power enabling it to legislate, when required, for the Empire as a whole, while no useful purpose could be served by sharing this power with the Dominion Parliaments. Nor again would it be consistent with the maintenance of constitutional unity to delegate to the Dominion governors the power of making peace and war or the legal control of diplomatic relations. The participation of the Dominions in foreign affairs, as set forth in the report of 1926, can be made fully effective without any change in the existing law which vests the conduct of these matters in the Crown as a part of the royal prerogative to be exercised by the King in England.

On the other hand, there seems to be no valid reason for maintaining the territorial limitations, if they really exist, upon the efficacy of colonial legislation. This point could be easily dealt with by a declaratory Act providing that no colonial legislation should be deemed invalid merely because it attached civil or criminal consequences within the jurisdiction to events that took place outside. It would be undesirable that any attempt should be made to restrict the jurisdiction of the Dominions in criminal matters to their own citizens, since any such provisions would raise great difficulties of interpretation. In practice it would be safe to rely upon common sense to prevent any abuse of legislative power, and there seems no reason why British subjects who commit murder or bigamy should not be amenable to punishment in any part of the Empire under the provisions of the local criminal law.

With regard to the royal prerogative, the report of 1926 declares that there is no desire on the part of the British Government to insist upon retaining the Privy Council appeal against the wishes of any of the Dominions, and it therefore seems desirable that the Dominions should be expressly empowered to abolish the appeal in its entirety, including the appeal by special leave. If complete freedom of action is given it is highly probable that it will be very sparingly used, and that the appeal will be retained in all cases where its retention is of real value. Apart from this point there seems to be no need to alter the present law governing legislation that touches the prerogative. Except in relation to the question of appeals no attempt is made in practice to transgress the accepted limits.

The question of the Colonial Laws Validity Act presents more difficulty. This statute clearly expresses an obsolete conception of imperial relations, and in its present form it is quite inconsistent with the principle of 'equality of status' enunciated by the last Imperial Conference. According to the modern conception of Empire the most effective check upon undesirable legislation is to be found in consultation and friendly remonstrance between the Governments concerned rather than in legal restrictions to be enforced by the Courts. My own view would therefore be that the second section should be entirely repealed in its application to the non-federal Dominions, and that their power to 'make laws for the peace, order and good government' of their territories should include the right to repeal or amend even statutes of the Imperial Parliament.[3] In

[3] It may here be pointed out the fifth section of the Act of 1865 somewhat inconsistently permits colonial Legislatures to alter their own constitutions, even

political practice the principle is now accepted that legislation is not to be forced upon the Dominions against their will, and it is clearly inconsistent with this principle to deny them the right of amending laws which they consider to be unsuitable to their own conditions.

In the case of Canada and Australia care would have to be taken that the new liberty did not operate to disturb the balance of power between the federal and the local Legislatures. So far as Australia is concerned it would be sufficient to preserve the existing arrangement whereby the amendment of the constitution is made conditional upon the approval of the people as expressed in a national referendum. In Canada opinion is sharply divided as to the desirability of vesting the power of amendment in any purely Canadian authority, for the Province of Quebec is continually afraid that the English-speaking majority in the Dominion may sanction some federal encroachment upon the field of provincial rights. Until the two main sections of the Canadian people have learned to trust one another somewhat more generously than they do at present it would probably be desirable to reserve the power of amending the Canadian constitution to the Imperial Parliament.

In the important matter of maritime law the result of repealing the present restrictions would be that the Dominions would be entirely free to make what laws they pleased within the limits laid down in practice by international law and the comity of nations. Undoubtedly this liberty, like any other liberty, would be capable of very serious abuse. The maintenance of uniformity in maritime law is a matter of the very highest importance to the Empire, and the recent negotiation of a number of international conventions indicates that the value of uniformity has now obtained a world-wide recognition. The enactment of the present restrictions in 1890 and 1894 was the expression of a fear that local selfishness and ignorance might lead colonial Legislatures into some course of action that would be inconsistent with imperial unity or with the observance of international obligations. The removal of the legal restrictions will be the expression of a confidence that an increased sense of responsibility and a wider experience of world statesmanship are now sufficient to guide the Dominion Parliaments in the discharge of their Imperial and international duties. As a principle of politics this doctrine has been affirmed without

though they have been enacted by the Imperial Parliament. The exact limits of the power thus conferred are somewhat doubtful. See *Taylor* v. *Att.-Gen. for Queensland* (1917) 23 C. L. R. 457, and *McCawley* v. *The King* [1920] A. C. 691.

qualification by the report of the Imperial Conference, and there seems to be no good reason why it should not now be expressed in terms of law.

If a general liberty of legislative action is conceded to the Dominions, it will naturally follow that the existing rules should be repealed which require certain classes of bills to be reserved for the consideration of the home Government. In 1891 the royal assent was refused to a Canadian bill dealing with load-lines that had been reserved under the provisions of the Merchant Shipping Act, but the exercise of this power of disallowance has now become obsolete in the case of the Dominions, and its formal preservation in relation to certain classes of bills constitutes an unnecessary badge of colonial inferiority. If any emergency should arise calling for the intervention of the home Government the plenary powers of the Imperial Parliament are amply sufficient to meet any possible need.

The limitations of space have compelled me to deal with the whole matter merely in the barest outline, and I may perhaps have given the impression that the question of the legislative competence of the Dominions is comparatively simple. In reality it is extremely complicated. No two Dominions enjoy exactly the same power of law-making, and the intricacies of constitutional law created by the Colonial Laws Validity Act and other statutes would require a volume for their adequate discussion. At Ottawa it is said that no man can tell how far the Canada Shipping Act[1] is within the competence of the Dominion or not, and it is clear that this statute alone raises a number of very difficult questions. The present complexity of the law throughout the Empire is the result of a century of tinkering undirected by any clear and consistent theory of the nature of imperial relations. The Conference of 1926 has now given us an intelligible account of the present political constitution of the British Commonwealth. We do not need a statutory 'constitution' in the American sense of the word, but it is time that Parliament should endeavour to complete the work of the Conference by removing from the positive law those anomalies which are in conflict with the political realities of the present day.

HERBERT A. SMITH.

[1] Rev. St. Can. c. 113.

"THE INFANT'S LIABILITY FOR NECESSARIES."

IF an infant who orders goods to be made or procured for him, which at the date of the order are necessaries, obtains similar goods *aliunde* before they are ready or are delivered to him, can he repudiate the contract?

In other words, is an infant only liable when necessaries have been sold and delivered to him?

It is clear that section 2 of the Sale of Goods Act, 1893, only deals with this case.

Is he liable if the goods have been bargained and sold? or, if the property has not passed to him, is he liable to damages for non-acceptance?

In the books on pleading it is noticeable that the plea and replication in cases of necessaries are only given where the declaration has been for goods sold and delivered. (Chitty and Bullen & Leake.)

There seems to be no case in which an infant has been held liable for the purchase of goods being necessaries when the goods have not been sold and delivered.

The Infants' Relief Act, 1874, does not touch the question. It says that contracts for goods supplied or to be supplied (other than contracts for necessaries) . . . shall be absolutely void. It merely then excepts contracts for necessaries from the category of contracts absolutely void. It does no more than this, even if we read into the exception the words 'to be supplied.'

How far was the infant liable on a contract for necessaries (being goods) before the Sale of Goods Act? It is submitted that this Act merely enacts the existing law. The infant was not liable to pay the contract price, but merely a reasonable price for goods sold and delivered. This seems to have been the view of Esher M.R. and Lopes L.J. in *Walter v. Everard* [1891] 2 Q. B. 369, and has been recently expressly stated by Scrutton L.J. in *Povey-Judd Crown v. Drew* [1927] 1 K. B. 214, at p. 220. He there says: 'The old course of pleading was a count for goods sold and delivered, a plea of infancy and a replication that the goods were necessaries, and then the plaintiff did not necessarily recover the price alleged, he recovered a

reasonable price for the necessaries. That does not imply a consensual contract.'

So far it would seem that an infant was and is only liable for necessaries where the goods have been sold and delivered. Is the true principle that, even though at the time of making the contract the goods were necessaries, they must not have ceased to be such when delivered? The replication in Chitty's 'Pleading' (6th ed.), Vol. III., p. 1072, states that the goods were necessaries 'at the time of the sale and delivery thereof.' But the replication in Bullen & Leake (1st ed.), p. 354, runs thus: 'That at the time of the contracting of the said debt the said goods were necessaries.' This form at first sight seems to suggest that the crucial date is the moment in which the contract is made. But the answer seems to be that the replication is to be used when the declaration has been for goods sold and delivered.

It may seem hard on the tradesman to take the time of delivery rather than the time of contracting as deciding whether the goods are necessaries or not, but it is equally hard on the infant to be saddled with goods which he does not require, or to be obliged to pay for them. Moreover, the law is said to be on the side of the infant.

Finally, does the case of *Roberts* v. *Gray* help the tradesman? In that case an infant who intended to make playing billiards the occupation of his life had entered into a contract with John Roberts to tour with him playing billiard matches. Roberts was to pay all travelling expenses. Roberts alleged that he had incurred liabilities in arranging matches, and he had made various payments for Gray's expenses. A dispute arose about the kind of billiard balls to be used, and Gray repudiated the contract. The jury found a verdict for the plaintiff for £1,500. It was left to the Lord Chief Justice to decide whether the contract was beneficial to the infant, and he decided in the affirmative. The decision was upheld by the Court of Appeal [1913] 1 K. B. 520. The Court expressed the view that the contract was a contract for necessaries. It was argued by counsel for Gray that, though an infant may be bound by a contract for necessaries (including instruction and education) so far as the consideration had been executed, he was not liable so far as the contract was executory. On this point Hamilton L.J. said: 'I am unable to appreciate why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory.' He states, however, earlier in his judgment, that the contract had been to some extent executed. This case

then decides that contracts for necessaries—being contracts for education, instruction and the like—are enforceable against an infant, at any rate if he has received any benefit under them and their terms are reasonable and for his advantage, and he cannot repudiate such a contract.

It would be tempting to argue that all contracts for 'necessaries,' *i.e.*, whether for the supply of goods or instruction, must be governed by the same rules, and that, therefore, if the contract when made was a contract for necessaries, the infant cannot repudiate it. But in this case the instruction had not ceased to be a necessary at the time of repudiation, whereas in the hypothetical case suggested above this has happened. Again, if this is the law, how would it be if an infant made an executory contract for the supply of goods, being at that time necessaries, and repudiates the contract without being otherwise supplied? Can he do so?

On the whole it seems that the answer is probably yes. The writer has found no case on the point and no precedent of pleading, except where the necessaries have been sold and delivered, and, though *Roberts* v. *Gray* may point to a different solution of the question, it hardly decides it, as the subject matter of the case is so different, and the point was not argued before the Court.

This view is further supported by examining the nature of the infant's liability for necessaries sold and delivered. As Scrutton L.J. said, his liability is not really contractual. It depends on the receipt of the goods, and in this respect he is in the same position as a lunatic. The law imposes on him a liability to pay, not the agreed price, but a reasonable price. In other words, the liability does not arise from contract or agreement, but is imposed by the law. It has been called *quasi*-contractual by high authority, *e.g.*, *per* Lindley L.J. in *Rhodes* v. *Rhodes* 44 Ch. D., at p. 107, and an executory *quasi*-contract is hardly conceivable.

Lastly, it may be asked if the law on this matter is satisfactory. For, apart from the question whether an infant is liable for goods bargained and sold or goods ordered, being necessaries, his liability seems to be *quasi*-contractual where the necessaries are goods but contractual where the necessaries take the form of a contract of apprenticeship or for education.

JOHN C. MILES.

PARTNERSHIP PROPERTY.

THE maxim '*inter mercatores ius accrescendi locum non habet*,' which is applied to partnership property in equity, is a rule of great convenience for the carrying on of partnership business, but it is sometimes very difficult to determine in what circumstances it is to be applied. For it is necessary in very many cases for the Court to delve deeply into partnership articles in order to ascertain whether a given piece of property is partnership property, or whether it is the separate property of one of the partners, or, again, whether it is simply held in concurrent ownership between the partners. The distinction may be one of very material necessity, for many reasons and in many circumstances, for the nature of the property will have a profound effect on the rights of the parties *inter se*, and also on their liabilities as regards third persons. Again, on the death of one partner, and still more on insolvency, the legal aspect of the property in question at material times may have a vital significance with regard to the rights of parties. It is the object of this survey to examine some of the difficulties which may arise in cases where property has been used in the conduct of partnership business.

In this, as in some other legal subjects, nomenclature has by no means been always clear. Even Lord Lindley at times uses the term 'joint estate' in such a way as to leave his meaning obscure, for it is only too easy to apply to this expression the two wholly different interpretations of property which is not the separate property of one partner in that it has become the property of the firm, and property which is not the property of the firm in that it is the joint property of the partners *qua* co-owners, not *qua* partners. The latter distinction is very well drawn in Roman law, though the advantage of clearness gained in one passage is largely obscured by vagueness in the rest of the relevant title '*pro socio*.' In this one passage, however, *societas* is distinguished from *communis*, and so, at any rate, Roman law has two words for two distinct relationships, though the two are used somewhat indiscriminately, as Mr. Monro has pointed out. An essential condition for the availability of the *actis pro socio* is the existence

of the relation of *societas;* it is not enough that a thing is held in common ownership, if there is not this partnership relation. It is possible for persons to hold property in common and yet avoid falling into the more intimate, consensual relation, as, for example, when the acquisition of concurrent ownership in a thing is, so to speak, involuntary, by the receipt of a joint legacy, or the making of a joint purchase without any ulterior intention, or when persons come in for an inheritance or gift in common, or purchase independently from two persons their respective shares.[1] Mr. Monro criticizes even this fragment as lacking in clarity, but it is submitted that a great point is gained when the nature of the relationship is understood to rest on the circumstances of acquisition of property, which give the key to the intentions of the parties with regard to it. *Societas* and *communio* are very different in their incidents, the former being consensual, the latter quasi-contractual; the trouble, in Roman no less than in English law, is that, whereas in the majority of cases it is obvious enough into which of the two relationships parties have entered, there will always be the exceptional class of cases where the line between them is hard to draw. In English law a very good working rule is given by Lord Romilly M.R., in *Steward* v. *Blakeway* (L. R. 6 Eq. 479). His test is—in any given case, see whether the trade was ancillary to the land, or the land to the trade. The facts were as follows:—Certain hereditaments, being partly agricultural land and partly a quarry, were vested in several co-owners in undivided shares. The quarry was worked, and the agricultural land let, and the rents thereof received by one of the co-owners on behalf of the rest; and the yearly rents and profits, after payment of outgoings and expenses, were in general divided among the owners in proportion to their shares. In some years, however, the profits were laid out in the purchase of lands in the same locality, and these were partly agricultural lands and partly used in connection with the quarry. The purchased lands were conveyed to the managing owner for the time being, and managed by him in the same way as the lands originally belonging to him and the other co-owners. It was held that the share of one of the co-owners, who died intestate, in the purchased lands, descended to her heir-at-law, and did not pass to her legal personal representative.

But, in *Waterer* v. *Waterer* (L. R. 15 Eq. 402), on facts not very different, the opposite conclusion was reached. A testator, a nurseryman, devised his real estate, on part of which he had

[1] Dig. 17, 2, 31.

carried on his business, and his residuary personal estate, to his three sons, F., M. and J., as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, F. and J. purchased M.'s third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. F. and J. then continued the business on the land, and F. subsequently died intestate. It was held that both the devised and the purchased land employed in the business was converted. James L.J., said: 'I am of opinion that this case is governed by that class of cases in which Lord Eldon said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business.'

From these two cases the following inferences can be drawn:—

1. The whole character of the property must be looked at. It is not enough that the land was used in the conduct of the business, in order to render it partnership property.

2. The designation 'partnership property' is preferable to that of 'joint estate.' In *Steward* v. *Blakeway* the land was joint estate in the sense of being concurrently owned, but was not treated as partnership property.

3. The tendency of cases before the Partnership Act may have been slightly in favour of construing documents disposing of property to be used in trade as partnership property; this conclusion is suggested by the apparent doubt in *Steward* v. *Blakeway* as to whether there was really a partnership at all.

4. In *Steward* v. *Blakeway* the co-owner's share went on her death to her heir-at-law. This raises a curious point, which is very directly involved in the question whether there was a partnership or not. If there was, then, whatever the nature of the concurrent ownership, equity would intervene in favour of such heir-at-law, in accordance with the maxim '*inter mercatores ius accrescendi locum non habet.*' But if there was not, and there had been no other grounds for treating the property as held by tenancy in common, would not the dispute as to the deceased owner's share have been between her personal representative and the survivors, and not between her personal representative and her heir? Or, in other words, is it not possible to imagine a case where circumstances might prevent

the application of the maxim, even where a trade has been carried on upon premises vested concurrently in two or more? Partners are never treated in equity as joint tenants, but it is submitted that equity might not always be inclined to tamper with the devolution of an interest of all deceased co-owners, if the trade carried on upon the land had been merely temporary and incidental. Lord Romilly, at p. 481, said: 'I do not doubt that in many cases, particularly where brewers have bought freehold public-houses, the land is ancillary to the trade, because it is essential that a brewer shall have a great number of places where he can sell the produce of his brewery. But that is not so where there is a quarry which belongs to two or more *joint tenants, or two tenants in common*, and they merely dig out part of the soil and sell it. In my opinion that is a case of real property: the trade is merely ancillary to the property which, upon the death of one of the individuals, *goes to the heir-at-law*. The italicized words are interesting, when viewed in the light of *Morris* v. *Barrett* (3 Y. & J. 384). There the residue of real and personal estates were devised by a testator to his two sons as joint tenants; they, after the testator's death, for twenty years carried on the business of farmers with such estates; they kept the profits in a common stock, and with part of them purchased other estates in the name of one of them, but entered into no agreement with respect to the business, nor ever accounted with each other. It was held, on the death of one of them, that they continued joint tenants of all property that passed by their father's will, but were tenants in common of the after-purchased estates. Sir Frederick Pollock is of opinion that 'it is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal.'[2] From his use of the words 'partnership property' it would seem that it might be possible for joint tenants to keep their interests immune from the maxim, even if they carry on a trade on their land, provided such land can be kept from falling into the designation 'partnership property.' The whole law of concurrent interests has, of course, been very much simplified by the Law of Property Act, 1925; as Dr. Cheshire admirably puts it: 'The legal joint tenancy remains immaculate and it is always ready to be passed to a purchaser.'[3] The overriding trust for sale, which has been established both where

[2] Digest of the Law of Partnership (11th ed.), p. 74.
[3] Modern Real Property, p. 438.

an estate is limited to two or more as tenants in common, and where it is limited to them jointly and beneficially, will tend to lessen the necessity for niceties of construction, and entirely dispose of it where the title of a purchaser is concerned.

5. Granted that a given piece of land is partnership property, the equitable presumption is that it is to be sold on dissolution of the partnership. This presumption receives legislative sanction in the Partnership Act, 1890, s. 22, which provides that 'where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.' So the equitable doctrine of conversion was fully applied to the interest of a deceased partner in the partnership property. But here again the law is much simplified by the legislation of 1925, for the Administration of Estates Act, by establishing a uniform system of intestate succession, has taken out of the hands of the doctrine of conversion the safeguarding of the devolution of beneficial interests, and limited the scope of that doctrine to the determination of the nature of property at any given time, namely, whether such property is to be regarded as land or money as between (in the case of partnership property) the partners, or the surviving partners and the representatives of a deceased partner. Where there is a will, too, questions may still arise as between the devisees and legatees; but the words of section 22 'and also . . . or administrators' are now superfluous. It is scarcely likely that partnership property will be held in any of the three ways in which the system of the Inheritance Act, 1833, still applies, *i.e.* where there is a limitation to an heir as purchaser, where a tenant in tail dies without disposing of his land by will, and sometimes on the death of a lunatic.

The Partnership Act has given guides for the determination of the question whether property is or is not partnership property. Section 20, sub-section 1 provides that 'all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.' It is not very clear exactly

what the section means; as a definition it requires definition itself, which can best be found in Lord Romilly's test in *Steward* v. *Blakeway*, *i.e.* is the land ancillary to the trade, or the trade to the land? Part of his decision in this case has been incorporated into the Act, for section 20, sub-section 3 provides that, where land is not partnership property, but the profits made by its use have been dealt with by the co-owners as partners, then other lands purchased with such profits are *prima facie* deemed to be held by them as co-owners, not partners. This sub-section was directly applied in *Davis* v. *Davis* ([1894] 1 Ch. 393), where partners in business borrowed money on the security of freehold premises of which they were tenants in common, and expended the money in adding a part of those premises to adjoining workshops in which the business was carried on and of which the partners were co-owners; it was held that the addition to the workshops did not become partnership property, so as upon the death of one of the partners to descend as personalty, but still kept its character of real estate. North J., said: 'The mere fact that the two houses, which, according to the special case, were not more fitted than any others for the carrying on of the business, were used for it, did not make them involved in the partnership dealings in such a way as to become partnership property.'

The foregoing examination of root principles may perhaps assist the understanding of the more important among the medley of cases which have been decided in connexion with partnership property. It is proposed to discuss a few of these, which involve the discrimination between partnership property and the separate property of one of the partners, which in its turn involves questions regarding the application of joint and separate estates in payment of joint and separate debts respectively, on insolvency. When creditors arrive upon the scene, nomenclature becomes more simple; it is not necessary to make any distinction between 'joint estate' and 'partnership property,' and in fact section 33, sub-section 6 of the Bankruptcy Act, 1914, does not do so, but distinguishes only between 'joint estate' and 'separate estate.'

In *Nerot* v. *Burnand* (4 Russ. 247) it was decided that, where a partnership had been dissolved, and then one partner, without the consent of the other, continued in possession of the partnership effects, and carried on the same business on the same premises, in the course of which the specific effects that belonged to the partnership were, in whole or part, consumed, and replaced by others, then the effects found on the premises, and

with which the business was carried on at the date of the decree, which declared the partnership to have been dissolved before the institution of the suit, were not to be treated as property of the partnership. But in *Bone* v. *Pollard* (24 Beav. 283), two sisters carried on business as farmers; they had a joint account at their bankers, an establishment and purse in common. They invested part of the money in buying consols in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes. It was held, on the death of one, that they were joint tenants of the consols, and tenants in common of the balance and deposit notes. The fact that £3,600 was invested in consols in their joint names was treated as precluding any doubt that their property in those consols was joint. *Clegg* v. *Clegg* (3 Giff. 322) is authority for the proposition that what is done by the tenant of two persons who have a joint interest in property, with a view to the benefit of both, although done on the property of one, does not leave in that one any exclusive right to the use of it for his own benefit, so as not to entitle the person, who bore his share of the burden, to his share of the benefit of the work thus constructed, to whatever purpose of advantage it may be used. The owners of contiguous estates, who were tenants in common of the mines beneath, were held to be equally entitled to the landing rent paid on foreign coal, raised through a shaft which had been constructed by a lessee of the mines, but which opened into the separate estate of one of the owners. Lord Lindley puts the point with admirable clearness:—'The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership moneys: for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone.'[4] Useful illustrations of these words may be found in *Smith* v. *Smith* (5 Ves. 189) and *Robley* v. *Brooke* (7 Bligh, 90). *Forster* v. *Hale* (3 Ves. 696; 5 Ves. 308) is an interesting case, as showing how deeply equity has bored into the law of partnership; the relations of partners *inter se*, with regard to the holding of property, are very closely allied with those of trustee and *cestui que trust*. The question whether a partnership subsisted in the trade of a colliery was treated as a question of fact, to be tried by evidence: and evidence from books and papers was admitted. The case is of particular value in that it contains a most ingenious and subtle interpretation of section 7

[4] Partnership (9th ed.), p. 411.

of the Statute of Frauds;[5] for it was laid down that land purchased in the name of one partner, but paid for by the firm, although there may be no declaration, or memorandum in writing disclosing the trust, and signed by the partner to whom the land has been conveyed, may nevertheless be the subject of a trust, if such evidence from books and papers be forthcoming; because the Statute of Frauds requires, no that the trust be created by writing, but that it be proved by writing; and the writing may be subsequent to the commencement of it.

It is now time to consider the well-known case of *Burdon* v. *Barkus* (3 Giff. 412; 4 De G. F. & J. 42). There a lessee of coal mines who had long worked on his own account, and continued so to work some only of the demised seams of coal, during the lease admitted a partner working another of the seams, and afterwards dissolved the partnership; it was held that the partner's interest in the lease was put an end to by the dissolution. The partner objected to the dissolution on the ground of an alleged verbal agreement that the partnership was to endure throughout the lease; the lessee (the plaintiff) relied on the Statute of Frauds; but the Court held that verbal evidence of the agreement was admissible, Turner L.J., saying: 'The Statute of Frauds is relied upon by the plaintiff in answer to the defendant's case, but whatever the agreement may have been, it has been part performed, and we are bound therefore, as far as may be possible, to ascertain what that agreement was. In considering that question, it is to be observed that the *onus probandi* rests upon the defendant, not only because the agreement is set up by him, but because the plaintiff has the legal interest in these seams; *and the effect of the agreement alleged being to constitute the plaintiff a trustee for the defendant*, it must, of course, rest upon the defendant to prove that trust.' The case shows clearly the following propositions to be correct:—

1. A lease acquired for the purposes of a partnership, whether in the name of one or all of the partners, and dedicated to the partnership purposes, forms part of the partnership assets.

2. But where the owner of a lease admits another to be his partner in the use of a part only of the demised property, and afterwards dissolves the partnership, the partner has no longer any interest in the lease.

3. The partner will, however, if he can adduce parol evidence

[5] This section is now replaced by section 53 of the Law of Property Act, 1925, but it is submitted that the new section has done nothing to disturb the correctness of this interpretation.

to prove an agreement constituting him a partner for the whole term of the lease, be entitled to an allowance in respect of any benefit that had accrued to the lessee in respect of the expenditure of partnership assets.

In the course of the judgments an interesting comparison was drawn between Roman and English law; it was suggested that the circumstances obtaining in the case might have prevented a dissolution of partnership in Roman law, and indeed it is very likely that the conduct of the plaintiff might have been stigmatized as a *renunciatio callida*; but, in English law, it is clear that either partner is at liberty to dissolve where the partnership is not for a definite period, but in giving effect to the dissolution the law deals with the case according to what is just and equitable between the parties. The maxim 'He who seeks equity must do equity' gives a very wide discretion in all kinds of cases. It will be observed that the defendant in this case did not fully discharge the *onus* of proving that the partnership was to endure for the whole term, and so it was treated as one at will only, but yet it would have been inequitable to have denied to the defendant all participation in profits accruing from the new pits which had been sunk at the partnership expense, and so an account on that footing was held to be rightly directed. Again, in *Fromont* v. *Coupland* (2 Bing. 170), plaintiff and defendant had been engaged in running a coach from one place to another—plaintiff finding horses for one part of the road, defendant for another; the profits of each party were calculated according to the number of miles covered by his own horses; the plaintiff received the fares, and rendered an account thereof to the defendant every week. It was held that plaintiff and defendant were partners in this concern, and, in an action by plaintiff against defendant upon a separate transaction, for the rent of stables, defendant could not set off a balance declared in his favour upon these weekly accounts. Best C.J., said: 'Before there can be an action on a set-off in respect of a claim arising out of a partnership account, there must be a final balance struck. . . . A balance during the continuance of the concern will not do.' Lord Eldon, in *Crawshay* v. *Collins* (2 Russ. 325), expressed his decided opinion that all partnerships should have written articles, so as, to use his own words, 'to shut out the interference of the Court.' It might with advantage be added that it would be desirable for such articles to state clearly what particular assets are to be regarded as partnership property. Where a partner adds funds to the assets, he cannot, by so doing, claim to enjoy profits

which arose from property of the original partnership, but the more equitable rule, it seems, can be expressed as follows:— 'You shall consider what you have added to the partnership funds as a debt due to you from it, which shall diminish the profits, or . . . it shall be made the subject of a claim for just allowance.' The flexibility of this equity gives the key to the decision in *Burdon* v. *Barkus*, and now a very clear decision on one point has been given in *Pocock* v. *Carter* ([1912] 1 Ch. 663), that where the premises upon which a partnership business is carried on are, and are declared by the partnership deed to be, the property of one partner, and the partnership deed contains no provision as to the tenancy of the partnership, but only a general direction that all rent is to be paid out of profits, the Court will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership, and not on a tenancy from year to year or at will. A Government contract entered into in the name of one of the partners may be part of the assets of a partnership: *Ambler* v. *Bolton* ((1872), L. R. 14 Eq. 427), where the contract contained a proviso against alienation, and so was an unsaleable asset.

Two more positions remain to be illustrated, namely, certain questions arising as between partners after a dissolution, as regards the user of land; and the conversion of partnership property into separate estate.

1. *Benham* v. *Gray* (5 C. B. 138) is a useful case with which to begin. In September, 1846, a partnership was entered into between A and B, the terms of which were never definitely arranged. Business continued to be carried on, in the names of A and B, in a shop and counting-house forming part of a house of which A was lessee, down to December 25, when A caused B to be served with a notice to dissolve the partnership. On January 2, 1847, B broke and entered the shop and counting-house. It was held that he was liable in trespass, his right to the occupation of the premises having ceased with the determination of the partnership. In *Doe d. Colnaghi* v. *Bluck* (8 C. & P. 464) it was decided that, if A let part of a house to a firm consisting of himself and B, for the carrying on of the business of the firm, and the partnership of A and B be dissolved, A may bring ejectment against B, and recover possession of the part of the house thus let, without giving B notice to quit; but in *Elliott* v. *Brown* (3 Swanst. 489 n.) an injunction was granted against a surviving partner, proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner, the lease being decided to be

accessory to the trade in which the parties were embarked. In *Alder* v. *Fouracre* (3 Swanst. 489), where a deceased partner had contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. On the point of ejectment *Doe d. Waitham* v. *Miles* (1 Stark. 181) is another useful case. By the terms of a deed of partnership a house was to be used and occupied by the partners during the partnership. After a dissolution of partnership no notice to quit is necessary previous to an action of ejectment against a partner. Notice by a partner that the partnership *has been dissolved* is evidence as against him that it has been dissolved by competent means and therefore is evidence of a dissolution by deed, if a deed be essential to such dissolution.

Mines are, from their very nature, a peculiar kind of property, and mines held by partners rest in a legal niche of their own. In *Roberts* v. *Eberhardt* (Kay 148) it was decided that where tenants in common of a mine have been working it in partnership or where the mine itself is the partnership property, the Court will not appoint a receiver or manager at the instance of one of the partners in a suit which does not seek to dissolve the partnership. Nor, even in a suit to dissolve the partnership, will the Court appoint a receiver on interlocutory application merely upon evidence that the partners do not co-operate in the management of the business; but, to sustain such an application, it must be shown that one partner has interfered so as to prevent the business from being carried on. A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of the minerals. Page Wood V.-C. had to distinguish *Jefferys* v. *Smith* (1 J. & W. 298), where Lord Eldon said: 'Where there are twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way?' But in that case there was active interference, and so Page Wood V.-C. was able to decide the later case differently. He said: 'Non-co-operation which leads one partner to act upon his own responsibility until interfered with is not a ground for appointing a receiver of the property.'

Bentley v. *Bates* (4 Y. & C. Ex. 182) lays down the principles that a mortgagee of the share of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the co-tenants in common, and that, on a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern.

2. The general principles, as regards the conversion of partnership property into separate estate, are clear, and are laid down in several cases. *Ruffin, Ex parte* (6 Ves. 119), establishes that a fair dissolution of partnership between two persons, one retiring and assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against the debts, is not impeachable so as to give the joint creditors an equity attaching upon partnership effects remaining in specie, where the other partner had continued the trade separately and then became bankrupt. But the assignment must be absolute; the completeness of the conversion may be overridden by the rule as to reputed ownership in bankruptcy if the property intended to be converted were, as in *Fell, Ex parte* (10 Ves. 347), in the order and disposition of the bankrupts at the time of the bankruptcy.[6] From *Peake, Ex parte* (1 Madd. 346) may be deduced certain conditions for the efficacy of conversion. One partner may agree with his co-partner, who is retiring, to give him a sum of money for the concern, though they know the partnership to be insolvent, provided no fraud was intended. The joint creditors have no equity against the joint effects, but what they claim through the medium of the partners themselves; that is to say, a joint creditor, if he does not take the remedy that the law gives him by action, and by proceeding to seize upon the joint effects, has no lien upon them; but joint property becomes separate property which the joint creditors cannot follow, if the following circumstances co-exist:—

(a) The partners make a fair contract *inter se*.

(b) They do actually dissolve the partnership.

(c) They fully effect a dissolution, with a contract for division of the property.

(d) They make an actual assignment by deed.

(e) Upon that assignment possession is delivered and enjoyment make the assignment perfect.

It was on cases like this, and especially on *Wheeler, Ex parte* (Buck, 25), where the condition on which the agreement for conversion depended was not fulfilled, that Lord Lindley made

[6] See also *Williams, Ex parte* (11 Ves. 3), *Rowlandson, Ex parte* (1 Rose, 416), *Clarkson, Ex parte* (4 D. & C. 56).

the following statement[7]: 'In order that an agreement may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed, and not be executory merely.' Neville J. has very neatly interpreted these words in *Pearce* v. *Bulteel* ([1916] 2 Ch. 544). They do not mean 'that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative.'

H. G. Hanbury.

[7] Partnership (9th ed.), p. 425.

REVIEWS AND NOTICES.

[*Short notices do not necessarily exclude fuller review hereafter.*]

Year Books of Edward II. Vol. XIV (Part II). 6 Edward II: A.D. 1313. Edited for the Selden Society by WILLIAM CRADDOCK BOLLAND, M.A., LL.D., of Lincoln's Inn, Barrister-at-Law. London: Quaritch. 1927. 4to. l and 190 pp.

In the Introduction to this fresh instalment of the Selden Society's Year Book Series Dr. Bolland deals with several interesting features of law and practice in Edward II's time.

His comparison of the Year Books and Plea Rolls, from the point of view of the differences in their respective accounts of what happened in the Common Bench during the trial of an action, throws new light on a subject with which he has already dealt elsewhere. Among other things he refers to the point that, judging from the incompleteness of many of the records in the Plea Rolls, a large proportion of the recorded actions seem never to have reached any definite conclusion by verdict and judgment; and he suggests reasons why this was in fact the case. Not only did it sometimes happen that one of the parties to an action died while it was pending, but there was also the difficulty, often amounting to the impossibility, of getting juries of the venue to go to Westminster. For both of these reasons many actions never reached their natural end; and this feature of such cases left its trace in the incompleteness of the records in the Plea Rolls.

Dr. Bolland makes some interesting comments on the subject of attornment, homage, and the writ of *per quae servicia*; while upon the question of the representation of the King in Court he explains that he has modified his earlier position in one rather important respect. In his Introduction to an earlier volume of the Year Book Series Dr. Bolland assumed, as he now explains, that 'a subject of the King, present in Court could take upon himself [the function of representing the King] only if the King were not already represented' (see *Year Book Series*, XVII, pp. xi, xii). He is now doubtful whether that earlier assumption is theoretically tenable, and cites the case of *Ballingham* v. *Burghill*, reported in the present volume (pp. 78—81). From this case, he says, 'it seems fairly inferable that if a subject of the King were present in Court in a case where it appeared that the King's interests were involved, he might intervene with what argument or application on the King's behalf he thought desirable or necessary, if the counsel, who was

professedly charging himself with the advancement or defence of the King's interests, himself failed to urge them' (p. xxi). In his *Proceedings against the Crown* (1217—1377), published in Vinogradoff's *Oxford Studies in Social and Legal History*, Dr. Ehrlich has thrown some light upon the question of the representation of the King in the Exchequer and the Chancery. In the Exchequer a member of the Court seems, on occasion, to have represented the King (p. 166); whereas in the Chancery the King's interests were safeguarded in a different way. In the Chancery, Dr. Ehrlich remarks, the 'King was represented by an attorney, or by his serjeants, or by a party whose interest coincided with that of the King—and not by the president of the Court' (p. 172). It is to be hoped that Dr. Bolland will pursue this matter further, and give us the result of his studies. The suggestion that the practice varied in the different Courts would seem to be worthy of his consideration.

As in his former editions of Year Books Dr. Bolland's remarks upon particular cases are illuminating. In the present volume this portion of the Introduction gives him the opportunity to deal with a variety of special subjects, such as the variants of the names of parties, the *bastard eigné*, and the casual methods of the times in regard to conveyancing. As in his previous writings on the Year Books Dr. Bolland is alert to draw attention to the human and dramatic side of the life of the times as reported in the Year Books. He also mentions certain points, involved in the consideration of an anonymous case (pp. 15—19), 'as they may possibly, when more fully considered in connexion with others, help to throw some light on the authorship of the Year Books, and how they were produced' (see pp. xxiv—xxvi).

H. D. H.

Carson's Real Property Statutes. Third edition. By H. W. Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Lim. Large 8vo. cxxviii and 1363 pp. (Price, £4 net.)

A new *Carson* is an event of some importance in the conveyancing world. Here we have the first annotated copies of all the new Property Acts assembled under one cover. It has not been an easy work to do, for the late Mr. Carson set a high standard. Mr. Law, however, has good reason to be satisfied with the result. The length of the book has been increased by nearly fifty per cent.: this was inevitable owing to the size of the recent Acts. One matter, however, has contributed to this result, namely, the inclusion of the whole of the Land Registration Act, 1925, and the notes thereon. The last edition, which appeared in 1910, had little or nothing to say on the old Land Transfer Acts of 1875 and 1897, but registration of title is growing in importance since the number of applications for registration has so largely increased. We are inclined, however, to think that the additional hundred pages on that question are rightly included, though the notes on this topic are somewhat scanty.

The cases on the general subject not affected by the new legislation have been brought down to October, 1926. Some very important judgments have been delivered since the last edition, notably on the right to light in *Slack* v. *Leeds, &c., Society* [1924] 2 Ch. 475, and the right to

support in *Thomson* v. *The Master and Fellows of St. Catherine's College, Cambridge* [1919] A. C. 468: these and others have been duly noted, and the book may be regarded as thoroughly up to date. Many of the notes, too, on the Fines and Recoveries Act, 1833, have been retained, and, we think, rightly retained, and it is well to have collected together those sections of that celebrated but much maimed statute that still remain to us.

In writing the notes on the Law of Property Act, 1925, the editor has clearly been in a difficulty, having regard to the date of publication. On the new sections he has not been able to do much more than give cross references. He is perhaps wisely reticent in comment on the transitional provisions in Part IV of the First Schedule, but he has noted up such cases as had then been decided on the Act generally. See, for example, on section 28 on trustees for sale at pages 618 to 620. Important changes effected by the Administration Act of 1925 are duly observed. That section of the work now figures as 'Administration of Estates of Deceased Persons' in lieu of the former 'Payment of Debts out of Real Estates' formerly to be seen in *Shelford* or *Carson*. That part of the work, pages 425 to 489, seems to us one of the most useful in the book. The index, though fully of 150 pages, might be somewhat increased, and, possibly, when we have settled down under the new Acts, a short supplement on decided cases would prove useful to practitioners. The price is, perhaps, rather too severe. This is a matter on which we all in these later days feel rather keenly; but our advice is, 'buy it if you possibly can.'

G. H. H.

Palmer's Company Precedents. Part I. General Forms. Thirteenth edition. By Alfred F. Topham, K.C., LL.M., and Alfred R. Taylour. London: Stevens & Sons, Ltd. Large 8vo. clxii and 1726 pp. (Price, £3 10*s.* net.)

In actual length of pages this edition is rather less than the last, the twelfth, which appeared in November, 1922, though this present volume looks bulkier, probably on account of a stouter quality of paper used. And this is so, even though the chapters on Reconstruction and on Banking and Advance Securities have been taken out and will, we are told, be transferred to Parts II and III respectively. That is probably a wise decision, for certainly Reconstruction comes more suitably in another place. It is suggested that Vol. II should more properly, when it appears, be called 'Reconstructions, Arrangements and Winding-up.' Even now there will apparently be some overlapping between the two volumes, for many notes and forms on 'Arrangements and Compromises' under that useful section 120 will still come in both. We venture to think that this should be avoided in future. It should also be added that the Banking and Advance Securities chapter could just as well come in Vol. III. The work is a monument of industry and ability, and has been very ably edited. Not much new matter, except some references to recent decided cases, has been included, though, in consequence of the new conveyancing practice initiated by the Property Acts, it has been thought desirable to have the book at the present time. This is a little unfortunate, perhaps, in view of the Company Law Amendment Committee

Report (Command paper 2657), published in 1926. We think that if the new bill now before the House of Lords goes through in a shape anything like that of the recommendations of that report, a small volume supplementary to Part I will very speedily be wanted. This, no doubt, will already have been considered. In a book of this kind cross-references are very necessary; probably these should be more numerous, for example in the notes to Forms 436 and 436A as to notices of extraordinary general meetings to be summoned for passing special or extraordinary resolutions it would have been better to give a forward reference to the useful note on p 1051 as to the requisites of such resolutions. It remains to be added that the editors have not overlooked one or two recent decisions which have found their way into the addenda, notably an important decision on *intra vires* (see *Parker & Cooper Ltd.* v. *Reading* [1926] Ch. 975). The index is very full and accurate, a feature which greatly adds to the value of such a book.

A small oversight seems to occur on p. 1453, for Order LIIIB, Rule 21, on court fees, given on that page, has been annulled by the Companies (Supreme Court) Fees Order, 1923, which is given on p. 1459, whereby a new scale of fees was substituted.

Whether the supplementary volume to which we referred above is included or not in the price of this book, we certainly expect that Chancery practitioners will find the whole publication a necessary part of their library.

G. H. H.

The York-Antwerp Rules. Their History and Development. By GEORGE RUPERT RUDOLF. London: Stevens & Sons, Ltd. 1926. xvi and 320 pp. (15*s.* net.)

THE York-Antwerp Rules are an outstanding example of the value of that unofficial international co-operation which during the last fifty years has been aiming at obtaining uniformity in adjustment of rights and liabilities under the documents of commerce in everyday use. For a generation the York-Antwerp Rules, 1890, have been almost universally incorporated in charterparties, bills of lading and policies of insurance and it is a tribute to the thoroughness of the work of the framers of these Rules that the Rules have held the field so long without amendment. The York-Antwerp Rules, 1924, for the most part merely carry the earlier rules to their logical conclusion and adjust them in minor respects to the altered needs of commerce to-day. Mr. Rudolf, who has a wide knowledge of the intricacies of the subject both as a practical average adjuster and as a joint editor of the last two editions of Lowndes' 'Law of General Average,' possesses peculiar qualifications for the task of dealing with historical development of the Rules and of commenting on the Rules in their final form in detail. The result is that the new book contains a wealth of information and pertinent criticism, and should certainly rank as the leading authority on the subject.

An interesting contrast in the history of the movement towards uniformity in commercial law is to be found in the fact that, whereas the York-Antwerp Rules (as Mr. Rudolf shows in Chapter I) were originally

intended to be the basis of uniform legislation in the different countries affected and only subsequently became an agreed set of rules for voluntary incorporation into contracts, the Hague Rules dealing with the law of carriage under bills of lading have perhaps unfortunately moved in the opposite direction. Originally intended to be incorporated voluntarily into contracts of affreightment, the latter finally were adopted by the diplomatic conference at Brussels as the basis of uniform national legislation, with the double result that owing to the failure of any foreign Government to give effect to the Convention these Rules are practically a dead letter except for voyages from British Possessions and that their amendment is attended with great difficulty.

It has from time to time in the past been suggested that, in view of the almost universal practice of insurance, the whole doctrine of general average had survived its period of practical utility and that no great hardship to anyone would result if the loss incurred for the common benefit were left to lie where it fell. Mr. Rudolf, however, in Chapter II points out, we think conclusively, that the abolition of general average would place the master of a vessel in trouble in the impossible position of having to discriminate between the interests of his employers, the shipowner and the cargo-owners and that the preservation of life and property at sea can most surely be secured if the officer entrusted with the duty of deciding upon the best course of action is left completely uninfluenced in his judgment by any bias in favour of one party or the other.

Probably the most useful portion of the book for the purpose of legal practitioners is Chapter III which contains the detailed comments on each Rule in turn, in many cases illustrated by pertinent examples. The comments have been made by one who has spent many years in the practical application of the old Rules and knows exactly where the shoe pinches. Mr. Rudolf is not blind to the fact that difficulties of interpretation and application may still arise under the new Rules. Where such difficulties are present he states the reasoned arguments on the one side and on the other and states his own conclusions. With these conclusions we are in general agreement.

Much of the preliminary spade-work in the preparation of the new Rules was done or inspired by His Honour Judge Dowdell K.C., and Appendix E contains a valuable collection of statements as to the law and practice on the subject of general average in many foreign countries which were prepared in 1910 in response to a questionnaire for which Mr. Dowdell was largely responsible. Mr. Rudolf rightly makes generous acknowledgment of the assistance which he has derived from that source.

W. L. M.

Mews' Digest of English Case Law. Second edition. Edited by Sir Alexander Wood Renton, K.C.M.G., K.C., Sydney Edward Williams and Wyndham A. Bewes. Vols. 18 to 22 (Shipping and Marine Insurance to Younger Children). London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd. and The Solicitors' Law Stationery Society, Ltd. 1925, 1926, 1927. 8vo. lxix pp. and 8539 cols. (35*s.* each vol.)

The publication of these five volumes completes this great work. The editors have wisely resisted the temptation to include in the later volumes cases decided since 1924, so that the whole Digest will be complete to the end of that year only and later annual Digests must be consulted for more recent decisions.

These five volumes contain many important titles. The whole of the eighteenth volume is taken up with 'Shipping and Marine Insurance,' a topic that includes not only the cases relating directly to ships, but also more relating to carriage of goods and passengers by sea, to Admiralty Practice, Collisions, Ports, Docks, Harbours and Lighthouses. Marine Insurance, we should have thought, might more conveniently have been dealt with in connection with other branches of Insurance rather than as a branch of Shipping law.

A good many Shipping cases are also to be found under the Title 'War' in Volume XXI. This title probably contains a larger proportion of new cases than any other in the Digest. It may be doubted whether anything is gained by collecting war cases under a separate title. War is not in itself a branch of law, and the editors have obviously found some difficulty in deciding whether the many cases which turned on the effect of war on contract should be treated as cases on 'Contract' or as cases on 'War.' In the result the Title is incomplete, and many of the more important cases arising out of the late war are not to be found here. The sub-heading 'Great War Cases' is specially defective in this respect. Probably not more than one-tenth of the 'Great War Cases' are digested under this sub-title, and it is not very clear why those which have been selected should not have been digested under other appropriate headings.

Some of the most useful titles in a digest are those which deal with small miscellaneous topics which are not to be found in any text-books in general use. Among titles of this kind we have in these volumes 'Shops,' 'Slavery,' 'Time,' 'Theatres,' 'Telephones,' 'Vaccination,' 'Usury' and 'Weights and Measures.' Questions as to the proper way of calculating periods of time arise in connection with many statutes and contracts of various kinds, and the collection of the authorities on this question is invaluable. We only miss one case with which we are familiar, namely, *Smith* v. *Gold Coast and Ashanti Explorers, Lim.* There might also have been included the authorities on the meaning of the expressions 'Immediately' and 'Forthwith' as used in charter-parties.

Hidden away at the end of the title 'Weights and Measures' is a useful collection of cases on the measurement of distance, whether by the nearest road or as the crow flies.

Another useful and well-arranged short title is that on 'Shops,' but we fail to find some cases in which the meaning of the expression as used

in Local Acts has been discussed, such as *Fearon* v. *Mitchell*, *Wiltshire* v. *Willett*, *Ashworth* v. *Heyworth*, *Pope* v. *Whalley* and *Haynes* v. *Ford*.

The last volume consists almost entirely of the two titles, 'Wills' and 'Workmen's Compensation.' Following well-established precedent there is a final title on 'Younger Children,' containing a number of cases which might well be digested under 'Wills' and 'Settlements.'

However, it is easier to criticize than to construct a work of this kind. Almost any case might appropriately be placed in any one of half a dozen Titles and, if it were referred to in all, the size of the work would be such that its cost would be prohibitive.

Key and Elphinstone's Compendium of Precedents in Conveyancing. Vol. II; Part II. Twelfth edition. By FREDERICK TRENTHAM MAW and HOWARD WADE RENSHAW. London: Sweet & Maxwell, Ltd. 1926. La. 8vo. cxxxvii and 453—1088 pp. (Complete work, £5 15*s*. 6*d*.)

THIS part, which contains Releases, Separation Deeds, Settlements, Vesting Deeds, and Wills, completes the work. Upon this part even greater care appears to have been lavished than upon the others. It is not of course possible to have avoided all slips such as *Re Frewen* being spelt on p. 658 as *Re Freme*, but the list of addenda and corrigenda is remarkably short for so difficult an undertaking. The sad fate of *Re Craven* [1920] Ch. 985 should perhaps be mentioned. The reference in the table of cases is to p. 690, but the case appears on p. 691. The law is said to be that a person who has the powers of a tenant for life under the Settled Land Act, s. 23, is neither a tenant for life nor a statutory owner, whereas the judgment of Astbury J. appears to turn upon the point that, though a statutory owner, such person differs from one having the powers of a tenant for life under section 20, S. L. Act, in that he can release those powers. It may also perhaps be doubted that conversion is no longer of importance in the case of rights which accrue after 1925 (p. 546), even despite the alterations in conveyancing with equitable interests introduced by the Law of Property Act, 1925, to which allusion is not made. There remain, it is conceived, sufficient distinctions in conveyancing, and even in substantive law, *e.g.* in the application of order of payment of debts and legacies in the administration of deceased's estate, to prevent that branch of law from becoming, as some may think deservedly, obsolete. In this connexion reference may be made to the admirably succinct account of succession on intestacy (pp. 935 *et sqq.*), which incorporates the Adoption of Children Act and the Legitimacy Act. It might, however, have referred to the continuance of the old form of succession under the Inheritance Act in cases which formerly would have come within the rule in *Shelley's Case*, as well as the cases of entailed interests and a person of unsound mind before 1926 who dies without recovery after 1925.

Apart from the inclusion of new forms, such as vesting instruments, perhaps the most interesting alteration is the exclusion of any term of years to secure portions. The object is achieved by making the tenant for life a trustee to raise the money at the request of the trustees. No

clearer indication of the true effect of the alteration of the nature of a strict settlement into a trust instrument operating behind a vesting deed could be afforded, and the reasons (p. 646) given for the change in form seem at least sufficient. The attention devoted to trusts for sale is also significant of their importance under the new scheme, while the note on the powers of trustees for sale (pp. 546 *et sqq.*) is an admirable example of lucid compression. On this point, however, mention may be made of the fact that to refer to powers of trustees to mortgage simply under S. L. Act, s. 71, seems inadequate, and the statement of the law in *Re Gray* (p. 547) is not without ambiguity, though it is more clearly stated on another page (p. 527), to which no cross-reference is given.

Despite slight blemishes, however, these volumes now stand as a monument of careful drafting and lucid explanation of an old subject with much new matter that will afford the greatest assistance in putting what is called "the new conveyancing" on sound lines of development.

H. P.

Strahan's Concise Introduction to Conveyancing. Third edition. By L. B. Tillard, of the Inner Temple, Barrister-at-Law, Tutor to the Law Society. London: Butterworth & Co. 1927. La. 8vo. xxiii and 435 pp. (21*s.* net.)

This eminently readable exposition on a subject which is not usually regarded from this point of view has lost nothing in this respect from the manner in which it has been brought up to date. Its admirable lucidity has, indeed, been enhanced from the general excellence of its production and the skilful manner in which the typography has been arranged. Added to the clearness of expression and arrangement, the editor has introduced a number of precedents by way of concrete illustrations of the matter, which enable a student more adequately to grasp what is, after all, an essentially practical subject. It is to be regretted that in these illustrations appear phraseology, though doubtless perfectly accurate, not commonly to be found in the books of precedents. It would seem that for an introductory book the most usual forms should be utilized. Perhaps the most difficult part of work of this character is the task of selection, and criticism on this ground is apt to be unnecessarily severe, but it may perhaps be suggested that much of the historical explanation were better left to those treatises more concerned with Real Property. Any reader of a work, however introductory, on the subject of conveyancing must be presumed to be familiar with real property, to whom, therefore, an historical account of the growth of the rule in *Shelley's Case*, copyholds, or even the forms of conveyance long since antiquated, should be superfluous. This is more particularly so since the historical exposition on *Shelley's Case* (p. 195) in no wise accords with recent historical research (see *Holdsworth's History of Law*, Vol. VII, pp. 107 *et sqq.*). Nor would the statement that a freeman could hold nothing but a freehold estate (p. 95) commend itself to the legal historian. In like manner the learning on determinable and conditional fees (pp. 104 and 105) would not meet with ready acceptance at the hands of some learned lawyers, at least as stated in so dogmatic a form.

Another difficult question is the precise nature of detail which can safely or properly be omitted. It is to be doubted whether it is more

important to note that a conveyance to a charity formerly required two witnesses (p. 46) than that it must take effect in immediate possession, but it is certainly necessary to observe, should witnesses be mentioned, that this requirement has ceased to exist (S. L. Act, s. 29, sub-s. 4). It is likewise a doubtful policy to leave the powers of a tenant for life under the Settled Land Act to be mastered from the real property books, since, though they may appear there, they are so essentially practical in character and form, so integral a part of the machinery of setlements that it is natural to expect a fuller treatment of these subjects here than would be regarded as suitable for a work confining itself to the principles of real property law. In the same connexion may be mentioned what appear to be inadequate references to the provisions of the Settled Land Act, s. 16, and its analogous section 3 of the Law of Property Act, 1925. It may be a convenience to note that the example on p. 183 would leave the impression that on grant of an under-lease the intending under-lessee would not be entitled to call for the under-lessor's title to grant the leave, as distinct, of course, from the freehold reversion (L. P. Act, s. 44, sub-ss. 1, 4); that the statement on p. 157 would suggest that a restrictive covenant in a lease would not bind assigns unless mentioned, prior to 1926; that the somewhat inadequate paragraph on p. 296 respecting collateral advantages in mortgages would confine such stipulations within the continuance of the security. These points are mentioned in no critical spirit, but because it is conceived that a book which provides so admirable an introduction for beginners will readily run into further editions, and that in them the editor may like to amplify and explain in order that such misconceptions should be impossible.

H. P.

Chronological Table and Index of the Statutes to December 31, 1926. Issued annually. Forty-second edition. 1927. London: His Majesty's Stationery Office. Vol. I: Chronological Table of All The Statutes. xi and 720 pp. (21*s.* net.) Vol. II: Index to The Statutes In Force. iv and 1764 pp. (£2 15*s.* net.)

> Saint Peter stopped, at the Celestial Gate,
> A writer who had sought that way of late:
> 'No, Author, no, I cannot let you through it--
> You wrote a "Life" and put no index to it.'

JUDGED by this test Dr. Cecil T. Carr, LL.D., the editor of the present volumes, will be certain to receive high rank in the celestial hierarchy, for it is difficult to think of any work more useful to the legal profession than these indexes. It is unfortunate that they are not more widely known; we have recently visited three private libraries which contained all the necessary reference books except the instant ones. Perhaps, being issued by His Majesty's Stationery Office, they are handicapped by not receiving the advertising which would be given to a private business publication. Perhaps, too, the price, which is high, has choked off many prospective purchasers. But even at the present figure every legal library ought to contain these books, for no statute can be safely dealt with until the Index has been consulted.

Of the two volumes, which are sold separately, the Chronological Table of All The Statutes is probably the less necessary to the practitioner. It covers the whole period between the passing of the earliest Statute of the Parliament of England—20 Hen. 3, Stat. Merton (1235), some chapters of which are still in force—and the end of the second session of the 34th Parliament on December 15, 1926. Each page is divided into three columns, the first of which gives the Year, Statute, and Chapter, the second of which gives the title, and the third shows whether the statute has been repealed or otherwise affected. It is, of course, the third column which is the important one, and to anyone whose duty it is to consider the history of a particular statute the references are invaluable.

A pleasant hour can be spent in examining this volume for it is full of curious information. The first two pages of the Table contain ten references to parts of statutes which are still in force on such subjects as emblements, common, distress, elections; House of Commons, fines and forfeitures, etc. All the Statutes enacted before 1800 are contained in 152 pages but it takes 568 pages to chronicle those since that date. The titles of some of the earlier Acts are more picturesque than those of our modern legislation. 37 Hen. 3 deals with 'Curse on breakers of the charters.' If only the Law of Property Act, 1925, had been entitled 'Damnation to the rule in *Shelley's Case* etc.'

Volume II which gives the Index to the Statutes in Force is, as we have said, of even greater practical importance. With the mass and rapidity of modern legislation such a reference book becomes essential. We cannot do better than quote from the preface to the 9th edition of Chalmers' 'Bills of Exchange': 'The volume of modern legislation is so great that it is never safe to rely on an Act cited without reference to the annual official "Index to the Statutes in Force" to see whether it has been amended, or repealed wholly or in part. For example, the Stamp Act, 1891, which was a consolidating measure, has been amended by sixty-four subsequent Acts.'

Statutory Rules and Orders Issued in the Year 1926. *Also Appendix of Prerogative Orders; Classified List of Local Orders; Tables Shewing Effect of Legislation; and Index.* London: His Majesty's Stationery Office. 1927. viii and 1520 pp. (£1 7*s.* 6*d.* net.)

This book contains the Statutory Rules and Orders of a public and general character made during 1926, and still in force at the end of the year. An exception has been made by including in the text various Orders made under the Emergency Powers Act, 1920. Though these Orders expired with the termination of a state of emergency, it was considered that the main documents were of sufficient interest to justify their being placed on record for future reference. It is fortunate that this step was taken, for these Orders will be of value not only to lawyers but also to historians of the period.

Annual volumes, similar to the present one, have been published since 1890. In that year, for the first time, the yearly output of delegated legislation was officially collected and made accessible. The copies of orders and regulations printed in these volumes are *prima facie* evidence.

It is unfortunate that this collection of Statutory Rules is not better known to the public. Delegated legislation is becoming of increasing importance at the present time; many statutes are merely skeletons until life is brought to them by departmental orders. The case of *Rex* v. *Kynaston* (19 Cr. A. R. 180; noted in the April number of the *Law Quarterly Review*, p. 155 above) showed, for example, that the Dangerous Drugs Act, 1925, was inoperative without an Order in Council. The table on p. 1451, giving the effect of the year's Rules and Orders on Statutes, is a useful reminder of their importance, for thirty-five statutes have been affected by them. In spite of this, it is difficult to find these volumes even in a public library.

In our review above of the 'Chronological Table and Index of the Statutes' we referred to the high price of those publications. This criticism can be made with even greater force of the present book. If the State assumes that the citizen will know the law, should not the State provide him with a cheap and accessible statement of the law? Imagine a magistrate asked to punish a man for breach of some regulation and explaining to him that ignorance is no excuse. Where is the defendant to find the law? At the price now charged for the book many local public libraries refuse to buy it even though it is the only complete collection of the general legislation of this kind. In a recent article in *The Nation* on the high cost of books Mr. Maynard Keynes explained that, with a small reading public, publishers were in most cases more certain to recoup themselves by charging a high price than they would be by charging a lower one on the chance of an increased circulation. Apparently His Majesty's Stationery Office acts on this principle; but we doubt how far a government office is justified in doing so when the book concerned is one which is an essential to the administration of justice as the present one is.

A Digest of The Law of Bills of Exchange. Ninth edition. By Sir M. D. Chalmers, K.C.B., C.S.I. London: Stevens & Sons, Ltd. 1927. 8° liv and 500 pp. (25*s.* net.)

In welcoming the ninth edition of such a classic as Chalmers' 'Bills of Exchange' it is unnecessary to say more than a few words in pointing out the changes that have been made since the last edition. The author has written a new preface in which he refers in particular to the Uniform Regulation prepared at the International Conferences held at The Hague in 1910 and 1912. 'A Convention was there drawn up under which each nation adhering to the Convention bound itself to enact the Regulation for its own territory. 'Thirty-one nations adhered to the Convention. Nearly all these nations were engaged during five years in fighting each other. Since the war they have been occupied mainly in first inflating, and then in deflating and trying to stabilize, their currencies; but now perhaps some or all of them will proceed with the promised legislation.' Great Britain and the United States, as is well known, were unable to adhere to the Convention, the Uniform Regulation being based on Continental law as opposed to the Anglo-American system founded on the common law. But cordial support was given to the Regulation, for, when it is finally adopted, the law relating to bills and notes will be reduced to

two great systems instead of presenting the multiplicity of laws now existing.

The eighth edition of 'Chalmers' was published in 1919 so that it has been necessary to include a considerable number of new cases in the present edition. Probably the most important of these is the recent judgment of the House of Lords in *Jones, Lim.* v. *Waring & Gillow, Lim.* [1926] A. C. 670. In an article entitled 'Payees as Holders in Due Course' (*Yale Law Journal*, March, 1927) Professor Aigler of the University of Michigan, after considering the previous English law on the subject and some American decisions, regrets that the Court did not 'reach what is believed to be the sound conclusion.' There is also an interesting note on this case in the 1927 *Cambridge Law Journal* where the same view is independently expressed. It would have been interesting if Sir M. D. Chalmers had given his opinion on this case, for in the eighth edition he took the opposite view of the law. With some diffidence we suggest that his statement on p. 108 may mislead the unwary reader. He says: 'It has been doubted how far the original payee of a bill or note which has been obtained by the fraud of a third party can be a "holder in due course"; but the House of Lords has now decided that he cannot.' But the House of Lords has held that in no case can the original payee of a bill be a 'holder in due course,' so that it is unnecessary to consider the question of fraud by a third party.

In the present edition the author has included frequent references to the American Code, as enacted for the State of New York in 1897, which follows to a great extent the English Act in its wording, though the arrangement is different. As he says, 'The decision of an American Court, trained in the common law, and interpreting a statutory provision common to both countries, must always be relevant when a similar question arises in England, though it is not, of course, a binding authority.'

Notes on Perusing Titles and on Practical Conveyancing. By Lewis E. Emmet, Solicitor. Eleventh edition in two volumes. London: The Solicitors' Law Stationery Society, Ltd. 8vo. Vol. I, 1926, lx and 1—589 pp.; Vol. II, 1927, 591—1068 pp. (50*s.* net.)

Since 1895 Mr. Emmet's well-known work has run through no less than ten editions, in the last of which (1923) he characteristically did not hesitate to treat of the Law of Property Act, 1922. The legislation of 1925 is the principal cause and justification of this, the eleventh, edition. The learned author has seized the occasion to expand his work into two volumes, and to add to the title the words 'and on Practical Conveyancing.'

And herein lies the keynote of the book. It has been, since its first appearance, a store-house of experience garnered from a busy conveyancing practice in Yorkshire. The author has turned his scanty hours of leisure into hours of industry in order to write his book and keep it continually up to date. Mr. Emmet deserves all the recognition which the circulation of the *Notes* implies as a devoted servant of his profession. His heart, like Coke's, is entirely in the right place.

Like Coke also, Mr. Emmet holds that 'no point of learning is to be praetermitted.' One finds in the *Notes* not so much a formal treatise as a craftsman's guide in applied science—which is a far better thing. There is, for example, no shirking of the problems raised by the new Acts; while in this, as in previous editions, the conveyancer will find practical points and illustrations which are discoverable in no other work. This book, in short, is helpful precisely because it is written with industry and understanding. Its author, we repeat, is engaged in a busy conveyancing practice, and he has appreciated with the utmost penetration and sympathy the difficulties which face the practitioner, and, let us add, the student.

Chapter VII of Part I is unique. In fourteen masterly pages Mr. Emmet lays down the general scheme of perusing an abstract. Every articled clerk should read, mark, learn, and inwardly digest this chapter as early as possible in his career. We venture to think that no conveyancer of whatever experience would fail to profit by a perusal of it. Chapter III of Part IV, on Trusts and Trustees, Voluntary Settlements, and Trusts for Sale is also exceptionally to be recommended. But the whole work is a conveyancer's *vade mecum* of the greatest merit and utility, and the present edition more than maintains the reputation of its predecessors. We would in conclusion gratefully acknowledge the value of the innumerable cross-references and of the index.

H. E. S.

Dowell's Income Tax. Ninth edition. By P. M. Smyth, Assistant Solicitor of Inland Revenue. London: Butterworth & Co. 1926. 8vo. 1021 pp. (45*s.* medium, 50*s.* thin.)

The publishers in a prefatory note say 'In addition to being the most complete work on the subject, Dowell is the official work. No one either personally or professionally concerned with Income Tax can be without it.' The claim is a substantial one. In every revenue appeal 'Dowell' is sure to be at the right hand both of the contestants and of the tribunal, for it is a mine of information, and there can be but few problems the authorities on which are not to be found there. But in spite of the deservedly great reputation the book has earned, it may be permissible to observe that it is impossible for a book arranged by way of section and annotation, to present a clear picture either of the Acts as a whole or of general principles. Although the Index has been carefully prepared the defect is radical. To make full use of Dowell it is necessary to have a considerable prior knowledge of the Acts and to know where to look. But for persons who have that knowledge the book is invaluable, and the practitioner may feel confident that every case bearing on the section under consideration will be referred to. A useful feature is the table showing the disposition of previous enactments and that showing cross-references of the Act of 1918 to the previous enactments. In considering decisions prior to 1918 these tables are of great value.

The Finance Act, 1926, is printed in full so that the changes in the basis of assessment that are to come into force for the year 1927-28 are easily accessible.

A great improvement has been effected in the new edition with a view to making clear what amendments have been introduced into the principal Act. Any section or part of a section that has been repealed is printed in italics, while the amendments or new provisions are underlined. The reader is thus enabled to see at once what is the law and need not be haunted by the fear that he has failed to find some amendment which will be the destruction of his case.

That this edition will be as successful as those of the past can hardly be doubted but the reviewer may be pardoned if he expresses a fervent wish that there was no necessity for Dowell or any other work on Income Tax. But if the tax must ever be with us, over the prostrate corpse of the taxpayer will eagles with Dowell, be gathered together.

M. E. R.

The Negotiable Instruments Law. By Joseph Doddridge Brannan. Fourth edition. By Zechariah Chafee, Jr., Professor of Law, Harvard University. Cincinnati: The W. H. Anderson Co. 1926. cxlviii and 1041 pp.

The adoption of the Negotiable Instruments Law throughout the entirety of the United States, coupled with the rapid growth of American case law on bills of exchange, has led to the issue of a new edition of Professor Brannan's commentary on the law, prepared at the author's request by Professor Chafee. The output of American judicial decisions on the subject is staggering to an English reader. The table of cases contained in the volume under review takes up no less than a hundred pages of print. Three pages of close type are devoted solely to the citation, without analysis or comment, of several hundred decisions of the Courts of the various jurisdictions in the United States on the question of the definition of the term 'holder in due course.' Nor is this the only difficulty with which the learned editor has been confronted. The sectional numbering of the statute varies in certain States, and in some instances Legislatures have modified its provisions, thus rendering it necessary to compile elaborate tables of variations and additions.

It would be almost an impertinence to bestow praise on this work; it requires none, as its value and excellence were established long ago. But it is impossible to refrain from expressing both admiration and respect for the manner in which the learned editor has carried out what must have been a colossal task, requiring infinite patience and care. The constant flow of new case law has made it necessary to reduce the length of the book, and this result has been attained by omitting the literature relating to the famous Brewster-Ames controversy as to the merits and demerits of the Negotiable Instruments Law. This is perhaps to be regretted, but the views of those taking part in the controversy have been summarised in the text. The treatment of the subject-matter takes the same form as in previous editions, and consists of a commentary on the statute section by section. Marginal notations have, however, been added and the references to articles in the American Law Reviews have been amplified: otherwise, the plan of the original work has not been disturbed. The English, as well as the American, cases have been digested and noted under the appropriate sections, and herein is to be found a study of

comparative law which will probably prove to be the most attractive feature of this work to readers on this side of the Atlantic.

It is interesting to observe that the American Courts are not in agreement on the thorny question as to whether a payee can be a holder in due course, now decided in the negative by the House of Lords in *Jones* v. *Waring & Gillow* [1926] A. C. 670. The balance of authority in the United States appears to support the affirmative view, and Professor Chafee suggests that the Negotiable Instruments Law might well be amended so as to give effect to the widespread understanding among business men that a payee can be a holder in due course. This is in some ways an attractive solution of the problem, but it does violence to the principles underlying the theory of negotiability. The difficulties created by irregular indorsements (such as that which constituted the problem in *MacDonald* v. *Nash* [1924] A. C. 625) appear to have come very frequently before the American Courts, and the questions involved cannot yet be regarded as settled. Certain of the differences between English and American law which are commented on in this work seem to the reviewer to be largely due to variations in banking practice in the two countries, but the extent to which business considerations have influenced apparent divergences in the law is a matter which could only be ascertained by prolonged and patient research by a lawyer acting in conjunction with a banking expert.

The problem which arises in connexion with the cashing of forged cheques by drawee banks seems to be a case in point.

In conclusion, the Negotiable Instruments Law furnishes perhaps the most important illustration of an essay in the unification of the law, not merely as between the different jurisdictions in the United States, but also as regards the English-speaking countries taken as a whole. For this reason alone Professor Chafee's edition of Brannan should make a strong appeal to English lawyers, and should find a place on the shelves of every law library in this country. Further than that, however, it has a distinct value for the practitioner, as it may furnish him with important guidance on points as to which English case law is silent, though the warning given above as to possible divergence in banking practice must always be borne in mind when consulting it for this purpose.

H. C. G.

Elliott on Workmen's Compensation. By Montague Berryman, Barrister-at-Law. Ninth edition. London: Sweet & Maxwell, Ltd. 1926. La. 8vo. xxxviii and 792 pp. (£2 2*s*. net.)

This is the ninth edition of this long-standing work. Its salient new feature is the incorporation of the Workmen's Compensation Act, 1925. This Act 'is a consolidation of the Workmen's Compensation Acts, 1906—1923,' and by its inclusion in the book under review the learned editor has of necessity been confronted with the difficulty of serving up new food in such a form as to render it least indigestible to those who have hitherto only been accustomed to the old.

Mr. Berryman has proved a skilful and efficient chef, and has himself, to pursue further our culinary metaphor, indicated in his preface the recipe for the palatable, though substantial, dish with which he has

provided us. 'First, a table of corresponding sections of the new and old Acts will be found at the commencement of the book, secondly, the repealed provisions of the old Acts are indicated in heavy type in the text alongside the sections of the 1925 Act to which they correspond, thus enabling anyone using the book to refer instantly from the new to the old Acts and *vice versa*.' We venture to think that Mr. Berryman has hit on the most practical scheme for the solution of his problem. It is obvious that he has taken great pains to be accurate in the cross-references from sections of the 1925 Act to the appropriate sections of the old Acts. However, we must mention that there is no reference to section 13 of the 1906 Act, or to section 22 of the 1923 Act alongside section 4, sub-sections 1 and 3, or section 4, sub-section 2, respectively of the 1925 Act at p. 144 of our copy. Further, on p. 513, County Courts Act, 1924, s. 5, is indicated as the section repealed by Schedule I (12) of the Workmen's Compensation Act, 1925, whereas section 6, sub-section 1, should surely have been substituted for section 5. The omissions from p. 144 have been remedied in the 'table of corresponding sections.' County Courts Act, 1924, s. 6, sub-s. 1, is, it is true, also included in this table, but it is shown as corresponding to section 47 of the Act of 1925. This, we submit with respect, is an obvious error.

As might be expected in such an organic branch of the law as this, many fresh cases have been decided since the date of the last edition. These will be found duly noted in the present work. Reference may here be made to some among them.

Hunter v. *Stadtische Hochseefischerei Gemeinnutzige Gesellschaft* M. B. H. (in liquidation) is important as deciding that on the facts of that case the owners were liable under the Workmen's Compensation Acts, although they were foreigners resident abroad. *Hewitson's Case* has been applied by the Court of Appeal, reversing the County Court judge, in *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* The *ratio decidendi* of *Newton's Case* may be fairly summed up by quoting the following words from the judgment of Sargant L.J., reported at 18 B. W. C. C., p. 14: 'I think this case is covered by the recent decision of the House of Lords in *Hewitson's Case* by which, in order for the workman to recover in such a case as this, the test laid down by Lord Buckmaster is whether the workman had merely a right to travel, or whether he was under an obligation to do so.'

Borley v. *Ockenden* and *Jones* v. *Tarr* are two interesting decisions of the Court of Appeal illustrating the joint effect of section 7 of the 1923 Act and section 1, sub-section 1, of the 1906 Act. There have been decisions of the Court of Appeal, too, 'on cases on partial dependency since January 1st, 1924.' Of section 22 of the Act of 1923, Warrington, L.J. said in *Peart's Case*, reported in 17 B. W. C. C., at p. 232: 'That section enacts for the future the construction of the definition of the principal Act which was adopted by the members of the Court of Appeal in *Simmons* v. *White Brothers*, [1899] 1 Q. B. 1005; 1 W. C. C. 89.'

Two fresh cases have been referred to under the heading of 'Children,' on p. 195. Incidentally we may mention, though we have no desire to seem hypercritical, that we think that the words in inverted commas in the paragraph so headed should read 'children under the age of fifteen so dependent' and not 'children under fifteen so dependent.'

The learned editor has had the satisfaction of knowing that in two instances, discussed on pp. 243 and 244, and 290 and 291 of this book,

his views as expressed in the last edition of this work have been shown to be correct by subsequent decisions of the Court of Appeal.

A slip occurs on p. 343 of our copy in the note on *Prendergast's Case*, where the County Court judge in the last reference but one to him is described as the 'Court Court judge.'

We would also draw attention to the fresh cases alluded to in the notes on section 12.

'The appendices,' as the learned editor says in his preface, 'have been maintained as complete as heretofore,' and include also the Workmen's Compensation Act, 1925, the Workmen's Compensation Rules, 1926, and the County Court Fees Order, 1925. The book is equipped with a list of 'Contents,' 'Table of Cases referred to,' and 'Index,' and its usefulness should be increased by the fact that a portion of it has been published on thin paper.

P. H. M. O.

The Workmen's Compensation Act, 1925 (*as amended by the Workmen's Compensation Act*, 1926), *and the Workmen's Compensation Rules*, 1926, and Regulations relating thereto, with a complete Index and Tables showing where the corresponding sections of the repealed Acts are to be found in the 1925 Act, and *vice versa*. By M. Turner-Samuels, Barrister-at-Law, and Donald Geddes, B.A. (Oxon), LL.B., of the Middle Temple. London: The Solicitors' Law Stationery Society, Ltd. 1927. iii and 282 pp. (7*s.* 6*d.* net.)

The nature of this useful little compilation appears from its title. It embodies in handy form the matter referred to in this title, and, in addition, the Workmen's Compensation Act, 1926, 'Industrial Diseases Extensions of the Third Schedule' and a 'List of Orders made under Powers contained in the Workmen's Compensation Act, 1925.' Obviously a great deal of the book's value lies in the index. This is a model of clearness. Subject, section, rule and page are juxtaposed in separate columns in so distinct a fashion as to be most likely to help in 'putting the practitioner's finger on any matter he desires to find provided for in the 1925 statute, and also in the Rules, regulations and forms applicable thereto.'

We have checked numerous references selected at random from those contained in the index, and with only one exception (on p. 265 of our copy, section 43, sub-section 1 (f), should be substituted for section 43, sub-section 1 (b)) have found them to be accurate.

Further, the tables of corresponding sections, included in the book, should also contribute materially to its usefulness.

Altogether we think that this work may fairly claim to have achieved its object, which is 'to provide a complete and easy guide to the Workmen's Compensation Act, 1925.'

P. H. M. O.

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the persons entitled to such property by virtue of a grant thereof from the Crown,' and now, in addition, it must be remembered that 'the real as well as the personal estates of persons dying after 1925 without husband or wife or kindred within certain classes of relationship and without having effectually disposed of the whole of their estates by will are *bona vacantia*.' In view of the far-reaching changes introduced by the Administration of Estates Act, 1925, few probably will be disposed to disagree with the learned author when he writes:—'It will be convenient, however, to consider the subject-matter of *bona vacantia* in the first instance without regard to the changes effected by the Administration of Estates Act, 1925, and to leave to a separate chapter a consideration of the amendments in the law effected by that Act. Accordingly, except where otherwise stated in the text, the subject will be treated without reference to the right to *bona vacantia* accruing in respect of estates of persons dying after 1925. Chapter VII of this treatise is devoted to that subject.' The reader may also welcome the admirable way in which Mr. Enever has classified the headings of *bona vacantia* at p. 18 of the book under review. This classification provides a faithful key to the treatment of the subject-matter.

The learned author speaks to a large extent from his experience in the Treasury Solicitor's Department in 'those parts of the work which deal with the administration of personal estates devolving as *bona vacantia* and assets of dissolved companies,' though he is careful to point out in his preface that 'the views expressed are those of the author personally, and must not be taken as necessarily corresponding with official views.'

In general it will be found that similar principles apply in the case of the accrual of the Crown's title as in the case of that of a subject, but where differences arise these have been noted. For example, we read in chapter III, with reference to claims to the undisposed-of residuary personal estate of a certain class of testator or testatrix, that 'as between the executors and the Crown or the Duke of Cornwall, in cases of testators dying before 1926, the onus still lies on the Crown to show that the executor is not intended to take beneficially.' Prior to the Executors Act, 1830, a similar onus had lain on the next-of-kin, but that Act shifted the burden of proof of beneficial title on to the executor in cases between the executor and the next-of-kin. It seems, however, that section 49 of the Administration of Estates Act, 1925, has removed this distinction in cases coming within this section. Incidentally the foot-note on p. 30 of our copy, which refers to the last-mentioned Act, suffers from an obvious oversight. It should, of course, read 15 Geo. 5, cap. 23, instead of 5 Geo. 5, cap. 23.

As another example of a difference, but of one this time which operates in the Crown's favour, we are told that 'contrary to the rule as to grants between subjects, grants by the Crown are construed more favourably to the Crown, where the words used admit of more than one meaning. General words do not pass prerogative rights in a grant from the Crown, unless they are expressly mentioned.' And the learned author illustrates his contention with examples. Chapter IV, which deals with the difficult subject of 'Foreign intestates dying without known kin and domicil in relation to succession and legitimacy,' is particularly well written. It must, however, now be read with references, where appropriate, to the Legitimacy Act, 1926. This Act was passed as the work was in the press, and consequently it was not found possible to embody such references in

the text. But the Appendix includes a copy of the Act, and also a valuable memorandum on it.

Chapter VI may be thought by some to deal with matter of less common occurrence at the present time, but it would be a mistake to assume that it may not have a bearing on modern events. For instance, a case raising questions of treasure trove was reported in *The Times* as recently as April 14 of this year. The suggested reason, quoted from Blackstone's Commentaries by Mr. Enever, at p. 70, when discussing the subject of 'Waifs,' for the exception in favour of a foreign merchant arising in the case of goods stolen from him, does not as regards part of it appear to accord with the maxim—'Ignorantia juris, quod quisque scire tenetur, neminem excusat.'

The extracts from statutes and statutory rules and orders contained in the Appendix should result in an appreciable saving of time to the reader, though in some cases we could have wished for more numerous cross-references in the foot-notes.

The book, which is also equipped with a table of cases, list of statutes and index, has been admirably produced and clearly printed. But may we mention that the page following page 98 in our copy was unnumbered?

To sum up, the learned author has contrived to preserve the broad aspect of his subject throughout, whilst exhibiting in no small degree the skill of a miniaturist. We congratulate him heartily on his performance.

P. H. M. O.

Terrell's Law and Practice Relating to Letters Patent for Inventions. Seventh edition. By Courtney Terrell and D. H. Corsellis, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1927. xl and 637 pp. (£3 3*s*. net.)

The last edition of this valuable work appeared in 1921, when it was rearranged and rewritten by Mr. Courtney Terrell and Mr. Arthur Jaffé to meet the changes and new problems in the law of Patents which arose from the War and Peace Legislation and the Act of 1919. In the present edition by Mr. Courtney Terrell and Mr. D. H. Corsellis there has been no need for any fundamental change in the scheme. The chapter (opportunely inserted in the last edition) on War and Peace Legislation has now been omitted; on the other hand, Procedure is throughout this edition more fully treated. The utmost care has been spent in incorporating the new case law and generally in guaranteeing an up-to-date and valuable edition. We wish that all legal text-books were as well indexed as this one.

H. E. S.

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As another example of a difference, but of one this time which operates in the Crown's favour, we are told that 'contrary to the rule as to grants between subjects, grants by the Crown are construed more favourably to the Crown, where the words used admit of more than one meaning. General words do not pass prerogative rights in a grant from the Crown, unless they are expressly mentioned.' And the learned author illustrates his contention with examples. Chapter IV, which deals with the difficult subject of 'Foreign intestates dying without known kin and domicil in relation to succession and legitimacy,' is particularly well written. It must, however, now be read with references, where appropriate, to the Legitimacy Act, 1926. This Act was passed as the work was in the press, and consequently it was not found possible to embody such references in

the text. But the Appendix includes a copy of the Act, and also a valuable memorandum on it.

Chapter VI may be thought by some to deal with matter of less common occurrence at the present time, but it would be a mistake to assume that it may not have a bearing on modern events. For instance, a case raising questions of treasure trove was reported in *The Times* as recently as April 14 of this year. The suggested reason, quoted from Blackstone's Commentaries by Mr. Ehever, at p. 70, when discussing the subject of 'Waifs' for the exception in favour of a foreign merchant arising in the case of goods stolen from him, does not as regards part of it appear to accord with the maxim—'Ignorantia juris, quod quisque scire tenetur, neminem excusat.'

The extracts from statutes and statutory rules and orders contained in the Appendix should result in an appreciable saving of time to the reader, though in some cases we could have wished for more numerous cross-references in the foot-notes.

The book, which is also equipped with a table of cases, list of statutes and index, has been admirably produced and clearly printed. But may we mention that the page following page 98 in our copy was unnumbered?

To sum up, the learned author has contrived to preserve the broad aspect of his subject throughout, whilst exhibiting in no small degree the skill of a miniaturist. We congratulate him heartily on his performance.

P. H. M. O.

Terrell's Law and Practice Relating to Letters Patent for Inventions. Seventh edition. By COURTNEY TERRELL and D. H. CORSELLIS, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1927. xl and 637 pp. (£3 3*s*. net.)

THE last edition of this valuable work appeared in 1921, when it was rearranged and rewritten by Mr. Courtney Terrell and Mr. Arthur Jaffé to meet the changes and new problems in the law of Patents which arose from the War and Peace Legislation and the Act of 1919. In the present edition by Mr. Courtney Terrell and Mr. D. H. Corsellis there has been no need for any fundamental change in the scheme. The chapter (opportunely inserted in the last edition) on War and Peace Legislation has now been omitted; on the other hand, Procedure is throughout this edition more fully treated. The utmost care has been spent in incorporating the new case law and generally in guaranteeing an up-to-date and valuable edition. We wish that all legal text-books were as well indexed as this one.

H. E. S.

Ringwood's Principles of Bankruptcy. Fifteenth edition. By A. Roper, Barrister-at-Law, assisted by G. L. Haggen, M.A., B.C.L., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1927. lvi and 715 pp. (£1 2*s.* 6*d.* net.)

Ringwood's Bankruptcy began its long and distinguished career as a book 'intended chiefly for the use of law students and candidates for the Examinations of the Institute of Chartered Accountants.' It 'attempted to show in clear and concise language the main principles of the Law of Bankruptcy without obscuring them under a perplexing mass of cases . . . and to select what may be called the leading decisions on the subject.' Although in the main it held true to its paramount object throughout fourteen successive editions, it inevitably became, even at the hands of expert editors, to a certain extent a thing of shreds and patches; and a point was reached at which the publishers very properly decided that the next edition should be no scissors and paste affair but a remodelling of the text and appendices.

The task was entrusted to Mr. Alma Roper, who had been in charge of recent editions. With the aid of Mr. Haggen he has produced a reconstruction which appears to us to be well balanced and rounded and admirable in every respect. One great improvement from the student's point of view is the narrative marginal précis which enables him on a first reading to follow the thread, and on a revision to recall the gist of the story.

The increased size of the book means that it has put on not fat but muscle. The index is more exhaustive and the appendices more complete than ever before. The latter now include all the relevant statutes, orders, rules, etc., and in fact everything except the Bankruptcy Forms. The book thus becomes of infinitely greater value to the practitioner.

H. E. S.

The Secretarial Handbook. By E. Westby-Nunn, B.A., LL.B., etc. London: The Solicitors' Law Stationery Society, Ltd. 1926. 8vo. 222 pp. (6*s.*)

This little book is described by the author and his publishers as a concise and readable handbook which will guide a secretary through the most important of the technical duties which he may be called upon to perform. This book, like all so-called handbooks, has a certain inherent vice; in that it purports to give an outline of the law relating to each of the duties of a secretary. A little legal knowledge may be a dangerous thing, and when acquired by laymen may tend to breed sea-lawyers. Nevertheless, in a book of this type, though dealing primarily with a secretary's technical duties, some statement of the law, however slight, is necessary, and if it is realised that the statement gives only the veriest outline, then the author may be congratulated on the discretion which he has shown, in electing what to insert and what to omit and upon the clarity with which he has expressed himself.

So far as the book deals with a secretary's practical functions it is excellent. In particular the secretarial programmes should prove of the greatest assistance.

H. W. P.

Books also received:—

Settled Land Grants. By A. Fitzgerald Hart (of the Principal Probate Registry) and W. E. Willan (of the Estate Duty Office), Joint Editors of 'Tristram and Coote's Probate Practice.' London: Butterworth & Co. 1927. Demy 8vo. x and 88 pp. (Price, 7*s.* 6*d.* net.)—This work is a lucid and concise account of the practice relating to settled land grants, together with precedents of forms of oath and bond. The scheme devised in regard to grants of representation on the death of an estate owner of land which is settled under the Settled Land Act, 1925, and the practice of obtaining the grants, are thoroughly explained. There is a useful collection of forms in settled land grants, and the relevant sections of the new Acts, including the Amendment Act, 1926, are set out *in extenso*. The names and the practical experience of the authors of this valuable work are sufficient guarantees for its accuracy.

The Devolution of Settled Land (with Concise Precedents). By A. H. Cosway, author of 'The Conveyancer's Notebook.' London: Effingham Wilson. 1927. Crown 8vo. vii and 116 pp. (Price, 4*s.* net.)—This little book is a clear and concise guide to the many complex problems which continually arise in dealings with settled land. Eight important cases on the new Acts are cited, and the intricacies of settled estates are dealt with in a practical way. It will be of real help to every busy practitioner.

The Cambridge Law Journal. Vol. III. No. 1. 1927. Published for the Cambridge University Law Society by Stevens & Sons, Ltd. Also on sale at the Squire Law Library, Cambridge. 147 pp. (5*s.* net.)—This number contains matters of considerable and various interests: we may specially mention Lord Justice Atkin's address to the Cambridge University Law Society on Appeal in English Law, and Mr. P. W. Duff's discussion of the Hindu doctrine that a family idol is a person in law (an odder kind of corporation sole, if possible, than an English parson) and its relation to the conflicting Fiction and Realist theories as to the nature of corporations in general.

The Mechanism of the Modern State. By Sir John A. R. Marriott, M.P. Two vols. Oxford: At the Clarendon Press. 1927. 8vo. xxiii, 596 and 595 pp. (£2 2*s.* net.)

Calendar of the Close Rolls Preserved in the Public Record Office, Richard II. Vol. VI. A.D. 1396—1399. London: H.M. Stationery Office. 1927. La. 8vo. 753 pp. (£2 7*s.* 6*d.* net.)

Calendar of Chancery Warrants Preserved in the Public Record Office. A.D. 1244—1326. London: H.M. Stationery Office. 1927. La. 8vo. xi and 753 pp. (£2 net.)

Disney's Law of Carriage by Railway. Seventh edition. By H. M. Paul, Barrister-at-Law. London: Stevens & Sons, Ltd. 1927. 8vo. xxi and 320 pp.

Early Holborn and the Legal Quarter of London. By E. Williams, F.R.G.S. Two vols. London: Sweet & Maxwell, Ltd. 1927. 4to. xvi and 1912 pp. (£5 5*s.* net.)

Palmer's Company Precedents. Thirteenth edition. By A. F. TOPHAM. Part III. Debentures. London: Stevens & Sons, Ltd. 1927. La. 8vo. cxi and 1024 pp. (£2 net.)

International Law. By the Right Hon. the EARL OF BIRKENHEAD, P.C., D.L., D.C.L., LL.D., His Majesty's Secretary of State for India. Sixth edition. Edited by RONW MOELWYN-HUGHES, B.A. (Wales), LL.B. (Cantab), of the Inner Temple, Barrister-at-Law. London: J. M. Dent & Sons, Ltd. 1927. 8vo. 486 pp. (21*s.* net.)

Copinger on the Law of Copyright. Sixth edition. By F. E. SCOLE-JAMES, B.C.L. London: Sweet & Maxwell, Ltd. 1927. La. 8vo. xx and 607 pp.

Rome the Law-Giver. By J. DECLAREUIL. London: Kegan Paul, Trench & Co., Ltd. 1927. La. 8vo. xvi and 400 pp. (16*s.* net.)

Archbold's Criminal Pleading, Evidence and Practice.—By Sir JOHN JERVIS. Twenty-seventh edition. By R. E. Ross. London: Sweet & Maxwell, Ltd., and Stevens & Son, Ltd. 1927. 8vo. cxiv and 1609 pp. (£2 12*s.* 6*d.*)

The Law Relating to Theatres, Music-Halls and other Public Entertainments and to the Performers therein.—By SIDNEY C. ISAACS, LL.B. London: Stevens & Son, Ltd. 1927. 8vo. xxxiii and 448 pp. (20*s.* net.)

Butterworth's Workmen's Compensation Cases. Vol. XIX (New Series). January 1 to November, 1926. Edited by His Honour Judge RUEGG, K.C., and EDGAR DALE, assisted by K. G. SHELLEY. London: Butterworth & Co. 1927. 8vo. xx, 814 and 4 pp. (22*s.* 6*d.*)

The Law of Torts. By FRANCIS M. BURDICK, Dwight Professor of Law in Columbia University School of Law. Fourth edition. By CHARLES L. BURDICK, Professor of Law and Dean of the Faculty of Law in the Cornell Law School. Albany, N.Y.: Banks & Co. 1926. La. 8vo. cxiii and 617 pp. (Price $9.00.)

Criminology and Penology. By JOHN LEWIS GILLIN, Ph.D., Professor of Sociology in the University of Wisconsin. London: Jonathan Cope. 8vo. xii and 873 pp. (25*s.* net.)

Prize Law during the World War. By JAMES WILFORD GARNER, Ph.D., LL.D. New York: The Macmillan Co. 1927. 8vo. xlviii and 712 pp. (25*s.* net.)

Private Law Sources and Analogies of International Law (with special reference to International Arbitration).—By H. LAUTERPACHT, Dr. Jur., Dr. Sc. Pol. (Vienna), LL.D. (Lond.). London: Longmans, Green & Co., Ltd. 1927. 8vo. xxiv and 326 pp. (25*s.* net.)

Table Talk of John Selden. Newly edited for the Selden Society by the Right Hon. Sir FREDERICK POLLOCK, Bart., K.C., D.C.L., LL.D., from a MS. hitherto uncollated, belonging to the Hon. Society of Lincoln's Inn. London: Quaritch. 1927. 4to. xxv and 200 pp. (7*s.* 6*d.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

Books for review should be sent to the care of the Publishers. All other editorial communications should be addressed to Mr. A. L. Goodhart, 13 Old Square, Lincoln's Inn, W.C.2.

THE

LAW QUARTERLY REVIEW.

No. CLXXII. October, 1927.

NOTES.

In *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888) 38 Ch. D. 295, the leading case on the subject, Bowen L.J. remarked that the maxim that a grantor shall not derogate from his own grant 'is as old, I will not say as the hills, but as old as the Year Books, and a great deal older.' Nevertheless, there is a steady crop of cases, year after year, in which this maxim is considered. Not the least important of these cases is *O'Cedar, Ltd.* v. *Slough Trading Co.* [1927] 2 K. B. 123; 96 L. J. K. B. 709. The defendants let to the plaintiffs premises to be used as a factory. Thereafter they let adjacent premises to another lessee, whose trade as a woodworker caused the premium on the plaintiffs' insurance policies to be considerably increased. Branson J. held that the lease to the woodworker, with the knowledge that this would increase the insurance risk, did not constitute a derogation from the lease granted to the plaintiffs. Since *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* [1921] 1 Ch. 200, it is clear that there can be a derogation from a grant, even though no physical effect is produced upon the demised premises. There is a derogation, provided the act done frustrates the purpose for which the premises were let. Nor need the frustration be complete. Provided the interference is substantial, there is a derogation from the grant (*Aldin* v. *Latimer Clark, Muirhead and Co.* [1894] 2 Ch. 437). But in the present case, the act of the defendants in letting the adjacent premises did not render it less easy or less legal for the plaintiffs to carry on their business; it merely added to the expense of carrying on that business. As Branson J. said: 'I should be extending the application of

the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applied to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely made it more expensive than it was before for the lessee to carry on his business on the demised premises.' If the act of the defendants had been to make insurance of the premises impossible, another question would have arisen.

In *Trego* v. *Hunt* [1896] A. C. 7, the House of Lords laid down the rule that the voluntary vendor of the good-will of a business could be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale. In *Walker* v. *Mottram*, 19 Ch. D. 355, the Court of Appeal held that an injunction would not be granted in the case of an alienation which was compulsory; the purchaser of the good-will of a business from the trustee in bankruptcy could not restrain the bankrupt from commencing a fresh business and soliciting the customers of his former business. In *Boorne* v. *Wicker* [1927] 1 Ch. 667; 96 L. J. Ch. 361, Tomlin J. had to consider facts which did not come clearly within either of the above cases. The defendant as executor of a will was bound to sell the testator's share in a business to the plaintiff, the surviving partner, if the latter elected within a certain period to take over the business upon terms. Could the executor be restrained from soliciting in his individual capacity the customers of the old firm while inquiries and valuations were proceeding for the assistance of the Court? The learned judge held that he could be so restrained: 'It seems to me to be against common honesty that he should be free at one and the same time to complete his testator's contract and to snatch away from the purchaser the property which he is effecting to convey to him.' Such a conclusion seems an eminently fair one. Although as executor he is bound to carry out his testator's contract, it is with his own consent that he acts in this capacity. A bankrupt, although he may join in the conveyance of the business, does so involuntarily and the sale is made not by him but by the trustee in bankruptcy.

'In my opinion,' says Scrutton L.J. in *Greer* v. *Downs Supply Company* [1927] 2 K. B. 28, 36; 96 L. J. K. B. 534, 'if one party to a purely commercial transaction makes a contract with another in ignorance of the fact that the latter is an agent merely, and in the honest belief that he is a principal, it is generally of no use to say he was negligent in entertaining his honest belief.' Thus the Court of Appeal reaffirms the principle so clearly laid down by Lindley L.J. in *Manchester Trust* v. *Furness* [1895] 2 Q. B. 539, 545, that the equitable doctrine of constructive notice must not be extended to commercial transactions. In the present case, the defendant purchased some timber from X, believing that X was doing business on his own account. As a matter of fact, X was an agent for the plaintiff. One condition of the contract was that the defendant might set off against the price the amount of a debt owing to him by X. In reply to an order, X sent to the defendant a letter signed by himself, as though he were the principal, but written upon paper bearing the name and address of the plaintiff. In answer to an inquiry, X told the defendant that the name was his trade name. The Court of Appeal held that the defendant was not under a duty to make further investigations, by means of which he could have found out that X was not a principal, but only an agent. As the defendant acted honestly, he could not be taken to know that X was an agent merely because he would have had means of discovering this fact. Although no mention is made in the judgments of *Pratt* v. *Willey* (1826) 2 C. & P., 350, this case must now be held to have been incorrectly decided, for Best C.J. there held that 'as the name of the plaintiff was in the tickets as the seller of the coals, the defendant ought to have made inquiry into the nature of the situation of Surtees, and should not, after that, have dealt with him as a principal.'

The present case is also of interest in its application of the classical doctrine of *Boulton* v. *Jones* (1857) 2 H. & N. 564; 27 L. J. Ex. 117. Although an undisclosed principal may generally sue on a contract, he cannot do so if the other party to the contract intended to deal only with the agent. As Lawrence L.J. said: 'The result is that the respondent, who *bona fide* believed that he was contracting with Godwin, is not to be treated as having contracted with the appellant merely because further inquiries might have disclosed that the appellant was the real vendor.'

Shuttleworth v. *Cox Brothers and Co.* [1927] 2 K. B. 9; 96 L. J. K. B. 104, is an excellent illustration that a clause in the articles of a company, if there is also in the articles a provision for alteration, cannot be relied on with safety by anyone dealing with the company, unless there is a contract specifically providing against alterations. In *Allen* v. *Gold Reefs of West Africa, Ltd.* [1900] 1 Ch. 656, Romer L.J. suggested a printed warning: 'Caution! Remember the powers of the company, by altering its articles, to extend its lien,' a caution which ought not to be limited only to liens. The articles of the company in the present case provided that certain persons were to be life directors unless they became disqualified for any of six specified causes. Thereafter by alteration of the articles a seventh cause was added, under which the plaintiff was removed as director. The removal was not in breach of contract, for 'in this case the contract, if any, derived its force and effect from the articles themselves, which may be altered. It is therefore not an absolute, but a conditional, contract.'

That this principle is not limited to companies, but applies to any organization which has rules subject to alteration, is illustrated by *Page* v. *Liverpool Victoria Friendly Society* (1927) 43 T. L. R. 375. The plaintiff in this case was appointed an agent of the defendants, whose rules, though subject to alteration, provided for the retention of agents so long as their conduct was satisfactory. Thereafter the defendants altered their rules by providing that agents should be retired at the age of 65. Rowlatt J., in giving judgment for the defendants, said: 'It has been argued that the rules cannot be altered to the prejudice of the plaintiff. That is an old fallacy. If one takes an office under a rule, one has to allow for the rule being altered in any way that is lawful for the alteration of the rule.'

In the *Shuttleworth Case*, a further point of interest was considered. In *Dafen Tinplate Co.* v. *Llanelly Steel Co.* [1920] 2 Ch. 124, 140, Peterson J. held that in altering the articles of a company it was not sufficient to show that the majority of the shareholders honestly believed that the alteration was for the benefit of the company: 'the question is whether, in fact, the alteration is genuinely for the benefit of the company.' This view was decisively rejected by the Court of Appeal in the present case. As Atkin L.J. said (p. 27): 'In my view, the question is solely for the shareholders acting in good faith.' The Court cannot manage the affairs of the many companies which alter

their articles; if the majority acts *bona fide* for the benefit of the company, that is all that the law requires.

The Court of Appeal in *Morgan* v. *The Liverpool Corporation* [1927] 2 K. B. 131; 96 L. J. K. B. 234, was divided on the questions raised except on the point that the *ratio decidendi* of *Fisher* v. *Walters* [1926] 2 K. B. 315, was incorrect. In the latter case the ceiling in a house which was within the Housing, Town Planning, etc., Act, 1909, ss. 14 and 15 (as re-enacted in section 1 of the Housing Act, 1925), fell and injured the plaintiff. The plaintiff had not given notice of a defect in the ceiling to the landlord as the defect was a latent one. The Divisional Court held that as the landlord was entitled under the Act to obtain access to the house to view its condition, and as the defect was a latent one, the plaintiff could recover, even though no notice had been given to the landlord. In the previous authorities, as for example in *Hugall* v. *M'Lean* (1885) 53 L. T. 94, 'there was no covenant enabling the landlord to enter.' In the present case the Court of Appeal took a different view of the authorities. As Lord Hanworth M.R. (p. 142) said: 'Finally, in *Murphy* v. *Hurley* [1922] 1 A. C. 369, I think it is quite clearly laid down that in cases of this sort, as between landlord and tenant, it is essential that the landlord should have notice even though he had means of access.' With all respect, there are in *Murphy* v. *Hurley* other *dicta*—for this particular point now under consideration did not have to be decided in that case—which can be quoted with equal cogency for the other view. So Lord Atkinson on p. 383 cites with approval *Tredway* v. *Machin*, 91 L. T. 310, 311: 'That rule rests upon the principle that the landlord is not the occupier of the premises and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair.' Lord Sumner on p. 388 says: 'The tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time.' Lord Parmoor on p. 395 also cites with approval the statement in *Tredway* v. *Machin*.

In the present case Atkin L.J., without discussing the authorities separately, says (p. 151): 'I cannot imagine a state of circumstances which would be more intolerable to a tenant, to say nothing of the landlord, if the landlord had repeatedly day by day

and so on, in order to protect himself, to survey all his houses for the purpose of seeing whether there was any little defect which might result and cause injury.' This argument is applicable of course to patent defects, but does not apply with equal force to latent ones, for in the latter case the defect can only be found by careful expert examination. That such examination should fall upon the landlord rather than upon the tenant seems to be more in consonance with the spirit of the various Acts considered in this case.

On the other points involved in this case the Court of Appeal was divided, so that Atkin L.J.'s warning is a timely one (p. 144): 'The result is that we have embarked and are embarking upon a series of *obiter dicta* in respect of the other parts of the case which I trust will be useful but which, so far as I can see, will not be authoritative.' The Master of the Rolls and Atkin L.J. held that section 2, sub-section 5 of the Increase of Rent, etc. (Restrictions) Act, 1920, did not impose an additional obligation upon the landlord towards his tenants. The Master of the Rolls and Lawrence L.J. held that the house was reasonably fit for human habitation within the meaning of section 1 of the Housing Act, 1925, even though the window cord of the window in the back room of the house was defective.

It is doubtful whether the conclusion reached in *Macnaghten* v. *Douglas* 96 L. J. K. B. 738; 43 T. L. R. 525, is in the interest of the public. The plaintiff, who described himself as a doctor of osteopathy, examined and treated the defendant's wife. His scale of charges was three guineas for a consultation and two guineas for each single visit including treatment. The County Court judge gave judgment for the defendant on the ground that the Medical Act, 1858, s. 32, applied: 'No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance or for the performance of any operation or for any medicine which he shall have both prescribed and supplied unless he shall prove upon the trial that he is registered under this Act.' The Divisional Court allowed the appeal and remitted the case for a new trial on the ground that it was impossible upon the facts before the Court to say whether the amount claimed could be split up so as to distinguish between charges for advice, if any, and charges for treatment. But ought such a severance to be allowed? If part of the charge made is for advice given, the contract ought to be held altogether void. In *Pickering* v. *Ilfracombe Railway* (1868) L. R. 3 C. P. 250,

Willes J. said: 'The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by common law, you may reject the bad part and retain the good.' In a medical contract there can never be a clear severance between advice and treatment; if advice is given to a patient he probably takes the treatment because of the advice, and if the advice is illegal in the sense that it cannot be charged for, the same rule ought to apply to the treatment. The case of *Hall* v. *Trotter* (1921) 38 T. L. R. 30, can be clearly distinguished, for in that case both the judges emphasized the fact that no advice was given.

In *Jubilee Cotton Mills, Ltd.* v. *Lewis* [1923] 1 Ch. 1, the Court of Appeal held that an allotment of shares and debentures made before filing a statement in lieu of a prospectus as required by section 82, sub-section 1 of the Companies (Consolidation) Act, 1908, was wholly void. The decision of the Court of Appeal was reversed in the House of Lords [1924] A. C. 958, on another point, but the majority of the learned lords seemed to agree with the Court of Appeal that such an allotment was void. In *Re James Burton and Son, Ltd.* [1927] 2 Ch. 132, an interesting question on such an allotment was decided by Romer J. In January, 1920, K applied on a form supplied to him by Y for shares in a company about to be formed, and on April 14 Y purported to transfer to K 100 shares. On April 16, before a prospectus had been issued or a statement in lieu thereof had been filed, the directors of the company purported to allot shares to Y. On April 20 a statement in lieu of a prospectus was filed. On April 30 the transfer of shares from Y to K was approved by the board and a share certificate was forwarded to K. K was registered as a member of the company, attended a meeting of the shareholders and accepted a bonus. Subsequently the company went into liquidation, and the question was raised whether K was a shareholder. Romer J. held that the allotment to Y on April 16 was void and that he therefore had no shares to transfer to K. He held, however, that K was a shareholder on either of two grounds: first, that when on April 30 the company accepted the transfer and registered K in respect of the shares an agreement was come to between K and the company by virtue of which he became a member in respect of those shares; and secondly, that even if there was no agreement between the company and K,

that K was estopped from denying that any such agreement had been come to. On the first point it seems doubtful whether a contract was actually entered into. K asked for a transfer of shares from Y to himself when, as a matter of fact, those shares were not held by Y. Can the company thereupon treat this request as an offer to accept other shares? Romer J. says: 'Surely that (request for a transfer) being presented by the transferee to the company must be taken as a request by him to the company to allot the shares to him.' With all respect, that seems to be a wide interpretation of the transferee's request. On the second point there seems to be no doubt that K was bound. He knew that he was on the register, he received a certificate, he acted as a shareholder, and he received a bonus. Having had the benefits he clearly could be estopped from denying that he was a shareholder when the position became less favourable.

Re Paget [1927] 2 Ch. 85; 96 L. J. Ch. 377, shows that there may be more than two sides to a question. Clauson J. had refused to direct a debtor, who was being examined publicly under section 15 of the Bankruptcy Act, 1914, to answer the question, 'In what name did you enlist in the first battalion of the London Fusiliers in 1916?' The learned judge said that he was not satisfied that there was a reasonable chance of the creditors benefiting if he directed the debtor to answer, and that he was satisfied that it would be to the debtor's detriment to give this name in public. The Court of Appeal allowed the Official Receiver's appeal on the ground that the learned judge had not exercised his discretion properly. Even though the disclosure might not assist in recovering assets, it was to the interest of the public, the third party, that full disclosure should be made. As Lord Hanworth M.R. said: 'The object of the examination being not merely for the purpose of collecting the debts on behalf of the creditors . . . but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply.' The fact that the answer might prove to the debtor's detriment is clearly not a sufficient or even a material reason, for in *Re Atherton* [1912] 2 K. B. 251, a debtor was required to answer certain questions even though the answers might incriminate him.

Cleghorn v. *Oldham* [1927] W. N. 147, adds one more to the rapidly growing number of golf cases. The plaintiff was a spectator on a golf course, and the defendant, who was not striking the ball but was merely demonstrating a stroke to a third person, struck the plaintiff in the face with the golf club. The jury found that the defendant was negligent, but counsel for the defendant argued that even if there had been negligence this was a case of *volenti non fit injuria*, for the plaintiff was a spectator and as such had agreed to accept the risks of the game. It has been established however by abundant authority (Beven, Negligence in Law (3rd ed.), vol. i, p. 111, and cases there cited) that this tacit agreement by a spectator or player only extends to the ordinary risks of the game and does not cover negligent acts. The defence therefore failed. But might it not be possible to argue that in this case the plaintiff was guilty of contributory negligence? Knowingly to stand within kicking reach of a horse having a red ribbon in its tail would clearly be negligence. Does not every golfer, figuratively speaking, wear a red ribbon? It is common knowledge that at any time he may take a practice swing or one to demonstrate why he failed to play the last stroke correctly. For a spectator to approach within club's length of a player holding a club in his hand might, therefore, be held to be contributory negligence.

Two recent cases which, although arising under different statutes, may prove to be in point if there should ever be a case under the first clause of the Trade Disputes and Trade Unions Act, 1927, are *Skinner* v. *Jack Breach, Ltd.* [1927] 2 K. B. 220, and *McDowell* v. *Standard Oil Company* [1927] A. C. 632; 96 L. J. Ch. 386. In the first case the Court had to determine the meaning of the words 'specified trades' in the Trade Boards Acts. 'Trade' was held to be synonymous with 'industry,' and these words were interpreted broadly by Lord Hewart, C.J., who said: 'When one looks at Acts of Parliament like the Trade Disputes Act, 1906, it appears that the word "trade" is commonly used to indicate the position created by the relation of employer and employed in certain branches or classes of industry. For example, a compositor says that his trade is that of a compositor and an engineer that his trade is engineering, while trade unions are spoken of under the name which indicates the particular calling, industry or occupation of the skilled craftsmen who are their members.'

In the second case the House of Lords held that in section 11 of

the Trade Marks Act, 1905, the words 'calculated to' do not mean 'intended to,' but 'likely (or reasonably likely) to.'

It is axiomatic that a constructive trust is raised by a Court of equity whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee (Lewin, Law of Trusts (12th ed.), p. 201). *Williams* v. *Barton* [1927] 2 Ch. 9; 96 L. J. Ch. 355, is an interesting illustration of this rule. The defendant, who was one of two trustees of a will, was in the employ of a firm of stockbrokers which paid him half the commission earned by the firm on all work introduced by him. At the suggestion of the defendant these stockbrokers were employed to value the securities of the testator. One half of the fees so earned were paid to the defendant, who took no part in making the valuations. The plaintiff, the other trustee of the will, asked for a declaration that the money so paid to the defendant must be paid to the estate, which Russell J. granted. By means of his position the defendant had introduced this work to the firm and had made a profit thereby. To permit a trustee in such circumstances to keep the fees would encourage a conflict between his self-interest and his duty as trustee, for a trustee is under a duty to seek the best agents for the trust, while as the recipient of remuneration from particular agents it would be in his interest to recommend them for the work, irrespective of their capacity to do it. The defendant relied upon *Re Dover Coalfield Extension, Ltd.* [1908] 1 Ch. 65, but that case can be easily distinguished. The D. Company transferred 1,000 shares which it held in the K. Company to C. and F. in trust in order to qualify them to become directors of the K. Company, the intention being that they should represent the interests of the D. Company on the board of the K. Company. It was held by the Court of Appeal that they were not bound to account to the D. Company for the remuneration received by them as directors of the K. Company. As Farwell L.J. said, 'the answer to the suggestion that they could not have earned the money unless they had been qualified to act as directors by shares belonging to the Dover Company is that they became directors at the request of that company.'

Leyton Urban Council v. *Wilkinson* [1927] 1 K. B. 853, has finally settled a question which has been before the Courts for over five hundred years: Can a corporation enter into a recognizance? In *Anonymous*, Moore, 68, Pl. 182, Trin. 6 Eliz., it is reported: Et la Dyer dit que il nad view que un corporacon poit estre lie un recognizance ou estatute merchant. In *Burghill* v. *Archbishop of York, etc.*, 1 Ld. Raym. 79, the Court held that 'an essoin is an excuse of the appearance of the party, now a corporation cannot appear, and therefore cannot cast an essoin nor enter into recognizance.' In *Cortis* v. *Kent Waterworks Company* (1827) 7 B. & C. 314, the question did not arise directly, but was discussed by the Court, Bayley J. casting some doubt on the earlier cases when he said, 'if it were necessary to decide that point I should pause before I said that a corporation is not competent to enter into a recognizance.' In *R.* v. *Manchester Corporation*, 7 E. & B. 453, Coleridge J. said, 'if the *certiorari* be sued at the instance of such body corporate, it cannot strictly speaking enter into a recognizance nor be subject to attachment.' He suggested, however, that this rule could be evaded by one or more members of the body corporate entering into a recognizance for it. As late as 1893, in Brice on *Ultra Vires* (3rd ed.), the learned author stated (p. 4) that a corporation could not be bound by a recognizance. In *Southern Counties Deposit Bank* v. *Boaler*, reported only in 59 J. P. 536, the recognizance of a corporation was, however, held bad, not because a corporation could not enter into a recognizance, but because the person entering into it was not authorized. In the present case the Court of Appeal did not bother itself with any antiquated notions concerning corporate capacity. As Atkin L.J. said (p. 864): 'I think, therefore, that the time has come to declare that whatever the law may have been in the past, the law now is that a corporation can enter into a recognizance by an agent.' The recognizance can, however, only be entered into by a duly authorized agent, and it must bind the corporation itself.

In the preface to the Chronological Table and Index of the Statutes on page iv, there is a list of certain of the vagaries found in the Acts of Parliament. In some instances Acts have been repealed in part after having been wholly repealed, while in other instances Acts have been repealed more than once. In *The petition of A. B. for declaration of legitimacy* [1927] W. N. 202, an even more remarkable lapse can be found. The Legi-

timacy Act, 1926, s. 2 sub-s. 1, directs that procedure shall be under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), a statute which has, in fact, been almost entirely repealed by the Judicature (Consolidation) Act, 1925, s. 226, Schedule 6, a legitimacy declaration now depending upon section 188 of that Act. Under the circumstances the President, Lord Merrivale, took the only possible step in holding that 'proceedings in cases of legitimacy declaration would proceed upon the basis that the intention of the Legitimacy Act, 1926, was to refer to the Judicature (Consolidation) Act, s. 188, and not to the earlier and repealed statute.'

It is not surprising that there is little direct authority on the various questions which may arise when a company is voluntarily wound up, for, as Lord Lindley said (*Lindley on Companies*, 6th ed., p. 1170): 'The cases in which any surplus is left are rare.' Nor is the Companies (Consolidation) Act, 1908, of much assistance. Section 186, sub-section (i) provides that: 'The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.' This, as Lord Herschell pointed out in *Birch* v. *Cropper*, 14 App. Cas. 525, 536, affords very little help, as it 'leaves undetermined what those rights and interests are.' The determination of the question depends in the first instance on an interpretation of the articles of the company. In *Re Mme. Tussaud & Sons, Ltd.* [1927] 1 Ch. 657; 96 L. J. Ch. 328, Eve J. had to consider the relative rights of the preference and ordinary shareholders. He held that there was a *prima facie* presumption in favour of equality of distribution amongst all the shareholders, and that the articles of the company did not prevent this result. The line between the present case and *Re Bridgewater Navigation Co.* [1891] 2 Ch. 317, is admittedly a fine one, but the articles which had to be construed were sufficiently different to admit of a distinction.

The moral of this case is that future litigation can easily be avoided by providing with sufficient clarity in the articles of a company what shall happen to its surplus assets in the event of a voluntary winding-up.

Undivided shares in land are providing a very large proportion of the decisions under the Law of Property Acts, so it is not, therefore, surprising to find that the law of this point was raised in the first case to go to the Court of Appeal. In *Re Ryder and Steadman's Contract* [1927] 2 Ch. 62; 96 L. J. Ch. 388, is not only remarkable for being the first case to go to the Court of Appeal, but also because that Court overruled the judgment of the Court below, and also for certain remarks made in the course of their judgments by the Master of the Rolls and Sargant L.J. The learned Lord Justice (at p. 84) said: 'In conclusion I desire to add that the learned judge (of the Court below) attached undue weight to certain expressions in a textbook written by a well-known conveyancer. Such expressions are no authority on the construction and effect of recent legislation; at the most they can only be adopted by counsel as embodying their arguments or by the Court as representing its ultimate view. Nor is any importance to be attributed to the views of the writer, because he may be recognized as the draftsman of the statute in question. On the contrary, that very fact may disable him from taking an unbiased view of the expressions used in the Act.' It is, perhaps, very well that from time to time a reminder should be given by high judicial authority that the statements of text writers, however eminent, are of no authority, but only a guide to authority, the value of which must depend upon the skill and learning of the writer. There is always a danger, particularly in a large uncharted field, that in some cases this may be overlooked.

The decision in *Re Ryder and Steadman's Contract* is of considerable importance in itself. The facts were simple. Three persons held, as tenants in common in fee simple, an estate purchased before 1926 from vendors, who sold the land subject to but with an indemnity against a jointure rentcharge subsisting under a settlement, which included other lands subject to the charge. After 1925 the purchasers contracted to sell the land, subject to the charge, but with the benefit of the indemnity. The purchasers claimed that they had power to do this as trustees for sale under the Law of Property Act, Sch. I, Part IV, para. 1 (2). Their purchaser, however, contended that the property had not been vested under these provisions, but came within Part IV, para. 1 (3), because at the time they took effect the land was settled land under the Settled Land Act, 1925, s. 1. This view was supported by the judge of first instance: *Re Ryder and Steadman's Contract* [1927] 1 Ch. 509; 96 L. J. Ch. 388.

The difficulty arose from the provisions of Sch. I, Part IV,

para. 1 (2), which reads ' if the entirety of the land (not being settled land) is vested absolutely and beneficially . . .' The definition of ' settled land ' in the Law of Property Act, 1925, s. 205, has the same meaning as in the Settled Land Act, 1925. As the vendors under this contract were manifestly absolutely and beneficially entitled, para. 1 (2) would apply, unless the land were settled land.

It was argued for the purchaser that ' (not being settled land) ' was intended to mean an interest which had become settled land under the Settled Land Act, 1925, since it was admitted that the estate of the vendors was not settled land before January 1, 1926: *Re Carnarvon's S. E.* [1927] 1 Ch. 138; 96 L. J. Ch. 49. The Court of Appeal held that this argument was unsound, and that it was a case in which the context otherwise required, so that settled land did not mean settled land under the Settled Land Act, 1925, in accordance with the Law of Property Act, 1925, s. 205. The reasoning upon which this construction was based was that to decide otherwise would involve interpreting part of the first sentence in para. 1 (2) as having reference to the law preceding 1926 and part to the law after 1925, a construction which they thought not to be justified.

The importance of this decision lies in the tendency, which may be observed, to avoid treating the new scheme as completely subversive of the old law where it applies; but of course it must also have considerable effect, practically, in extending the number of trusts for sale that have been created, which could not have existed had the other interpretation been adotped. This was emphasized by the decision that in this case the sale by the vendors should proceed and the land be made subject to the rentcharge in the hands of the purchaser. It was held that the Law of Property Act, 1925, s. 28, sub-s. 1, did not apply so as to enable the trustees for sale to override the jointure, since this took priority to the trust, as the jointure could not attach to the proceeds of sale. The trustees for sale had only vested in them the land subject to the jointure rentcharge. In any event, it was unnecessary to override the rentcharge under the Settled Land Act (had it been settled land, or been possible so to treat it), because of the express provision of the Law of Property (Amendment) Act, 1926, s. 1. Moreover, Sargant L.J. said (at p. 83): ' Again, it is at least extremely doubtful whether the documents creating the jointure can be coupled with the statutory trust for sale under Part IV of the First Schedule to the Law of Property Act, 1925, especially in view of the provision introduced into that section by a " minor amendment "

in the schedule to the Law of Property Act, 1926, namely: "(7) This section does not apply to land held upon trust for sale." ' His lordship did not refer to the decision in *Re Leigh's S. E.* [1926] Ch. 852; 95 L. J. Ch. 511 (noted *ante*, p. 16), but in considering the possibility of constituting a seftlement under the Settled Land Act in this case, it would seem necessary to decide whether (a) there is a trust for sale for the purposes of the Settled Land Act, and (b) the trust that does exist must necessarily exclude its operation.

In argument Farwell K.C. (at p. 72) suggested that the decision in *Re Leigh's S. E.* (*supra*) had no application to a statutory trust for sale, since 'a statutory trust is a trust to sell,' and that, therefore, 'the context otherwise required.' It is submitted with deference that a trust for sale is always a trust to sell, whether constituted by statute or a private person; after all it is upon this very point that the doctrine of conversion hangs. Furthermore, it is none the less a trust to sell that it can operate only in equity. Judging from the passage above quoted from Sargant L.J. (in which the other judges of the Court concurred), it would certainly appear that the Court held that there was a trust for sale, which fell within section 1, sub-section 7, of the Settled Land Act, but unfortunately it is not certain whether the Court adopted the view put forward by Farwell K.C. that *Re Leigh's S. E.* does not apply to the case of a statutory trust, or whether that case has been impliedly overruled. It is respectfully submitted that, if the former reasoning was not acceptable, the Court must have held that an overriding equity created under a former settlement does not prevent the existence of an 'immediate binding trust for sale,' that is to say, that *Re Leigh's S. E.* was, on this point, wrongly decided.

However, it is submitted that the true ground of the decision was that *Re Leigh's S. E.* had no application to the case of a statutory trust for sale, which must be regarded as immediate and binding. The reasoning is not very easy to follow. If it is based upon the construction that 'a statutory trust is a trust to sell,' it is certainly open to criticism, since it ignores the true point of *Re Leigh's S. E.* On the other hand, if it depends upon a construction that a statutory trust for sale requires a different interpretation from an ordinary trust for sale created by an instrument, that is to say, that the context will otherwise require, then there is a probability that this will have some far-reaching effects. It will certainly have the effect of extending the sphere

of the trust for sale, and there will be not a few conveyancers who will regard this as beneficial.

If, however, this trust for sale had not fallen expressly or by interpretation into the category of an 'immediate binding trust for sale,' excluding the Settled Land Act, could the documents creating the settlement, which charged the rentcharge on the land, constitute, together with the statutory trusts, a compound settlement? It was argued on behalf of the purchaser that they could. This point does not seem actually to have been decided, but Sargant L.J. expressed the opinion (quoted *supra*) that it was 'extremely doubtful'; on what grounds is not clear. In *Re Ogle's S. E.* [1927] 1 Ch. 229; 96 L. J. Ch. 113, a settlement was described as 'a state of affairs in relation to certain land, brought about, or deemed to be brought about, by one or more documents.' This definition, if so it may be called, certainly appears to contemplate that where a certain state of affairs exists under certian documents, and the law prescribes that it has become or may become settled land, then the law is read into the documents, and so the land may be treated as being subject to a settlement. It is clear that on the facts of *Re Ryder and Steadman's Contract* this question would only have required final decision had the Court held that there was no immediate binding trust for sale, and that there was no power to sell under section 1 of the Law of Property (Amendment) Act, 1926. The opinion expressed, though it must, it is submitted, be treated as a dictum, does lend support to the view that a statutory trust is to be treated as a thing apart. From this it might be argued that *Re Ogle's S. E.* (*supra*) must in this respect be applied strictly to documents, and not statutory trusts. This might provide an interesting and instructive point, and, should it ever arise, the dictum of Sargant L.J. will merit most careful attention.

H. P.

Despite the decision in *Re Brooker* [1926] W. N. 93, the rule in *Howe* v. *Lord Dartmouth* has received a renewal of its lease of life by the ruling in *Re Trollope's Will Trusts* [1927] 1 Ch. 596; 96 L. J. Ch. 340, that it still applies to pure personalty.

The reasoning in this case is worthy of attention, not only for the preservation of so famous an equity doctrine, but because it may go further than the point actually decided. Simply stated, the facts were that a residuary bequest was settled on trust for sale with power to postpone in favour of beneficiaries entitled in succession. There were two questions for decision: first, whether

the trustees, who were not personal representatives, came within the relevant section (Administration of Estates Act, 1925, s. 39), which it was argued had an effect similar to section 28, sub-section 2, of the Law of Property Act, 1925, abolishing the rule in *Howe* v. *Lord Dartmouth* with respect to leaseholds (*Re Brooker, supra*); secondly, whether section 39 had, in fact, this similar effect.

The Administration of Estates Act, 1925, s. 39, provides that personal representatives shall have, ' for the purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives,' certain powers and duties conferred or imposed by law in the case of a trust for sale, which were argued to have the effect of excluding the rule in *Howe* v. *Lord Dartmouth*.

Tomlin J. held, on the first point, that the definition of personal representative contained in section 55, sub-section 1, para. xi of the Administration of Estates Act, 1925, precluded section 39 of that Act from applying to any persons other than personal representatives acting as such. He explained the inclusion of reference to minorities and life interests by association with the provisions for intestacy and the position of trusteeship thrust upon personal representatives by the Administration of Estates Act, 1925, s. 33. It is respectfully suggested that, in view of the fact that section 33 expressly constitutes a trust for sale in the case of intestacy, it is a little difficult to understand why the draftsman wished to include these cases again in section 39. Apart from the immediate decision, this part of the judgment is important because it decides that (a) trustees under a will have as such no powers of administration under the Administration of Estates Act, 1925, and (b) *semble*, except where they are expressly mentioned, personal representatives acting during a minority or subsisting life interest under an intestacy are not affected by the provisions of that Act. This latter point may enhance the importance of distinguishing whether the acts of the personal representatives are in pursuance of general administration or in respect of these particular cases, while the former emphasizes the possible capacities of trustee and personal representative and the frequent difficulty in ascertaining the point of time at which one begins and the other ends. The simplification of this part of the law is not very apparent.

Secondly, section 39 of the Administration of Estates Act, 1925, confers upon personal representatives (sub-section 1 (ii)) ' the powers, discretions, and duties conferred or imposed by law

on trustées holding land upon an effectual trust for sale,' and (sub-section 1 (iii)) ' all the powers conferred on trustees for sale.' Under section 28, sub-section 2, of the Law of Property Act, a trustee for sale must, pending sale, pay the rents and profits as if they were the income of investments arising from the sale. If this sub-section was incorporated by section 39 above, then, following *Re Brooker, supra*, the rule in *Howe* v. *Lord Dartmouth* could not apply. The learned judge held that the duties of a trustee for sale mentioned in sub-section 1 (ii) referred only to cases where land was held on trust for sale by the personal representatives. It is respectfully submitted that this seems quite in accordance with the distinction made between sub-section 1 (ii) and sub-section 1 (iii), unless this latter provision was intended to have special reference to the binding force of the contract for sale upon all persons who were personal representatives for the time being. That the latter is a possible interpretation of this distinction may be supported by reference to the Settled Land Act, 1925, s. 90, sub-s. 2. It also appears to be somewhat obscure why there should be no reference to the duties and discretions of a trustees for sale of personalty, where it is otherwise with a trust for sale of land. The effect of these provisions, as they have been construed, appears to be that the personal representatives are virtually, for the purposes of administration, trustees for sale of land, but have the powers of a trustee for sale of pure personalty while they are under no duties in this respect.

H. P.

The case of *Mathieson's Trustee* v. *Burrup, Mathieson & Co.* [1927] 1 Ch. 562; 96 L. J. Ch. 148, is particularly interesting for the ground upon which the decision was based. It was held that, under the Bankruptcy Act, 1914, s. 31, an equitable debt could be set off against a legal debt, both debts being in existence before the date of the receiving order. There was no authority in point, and consequently general principles had to be applied. Clauson J. ([1927] 1 Ch., at p. 569) put the ground of his decision as follows: ' The Bankruptcy Act, as I understand it, is an Act regulating the proceedings of a Court which has always been a Court of Equity, proceeding on equitable principles, recognizing equitable debts, subject of course to such infirmities are are sometimes present, but drawing no distinction between equitable and legal rights for purposes of administering the estate of the bankrupt. I think, at this time of day, it would be very unfortunate if

it were held that a Court of Bankruptcy is in any way fettered by any such distinctions, except so far as any Court of Equity is fettered by the fact that certain infirmities may in certain circumstances attach to equitable rights as compared with corresponding legal rights.' This emphatic reminder of the equitable nature of what is sometimes called the common law of bankruptcy is not only apt but useful. Bankruptcy is, in this country, practically speaking, a statutory creation, and had, until a year or two ago, for so long been administered under the auspices of the common law side of the Courts that there is a tendency to overlook the fact that from just after the Restoration until 1831 (1 & 2 Will. 4, c. 56) bankruptcy was administered in the main by the Chancellor. Since the original statutes were not of a very elaborate character it is not surprising that in the course of this administration a considerable body of principle had grown up during this period to supplement their somewhat meagre provision. It was, in fact, the right to appeal from the Commissioners in Bankruptcy to the Chancellor, in case of 'unfair or unjust dealing,' which has constituted the Bankruptcy Court a Court of Equity, and given rise to a large part of the 'Common Law of Bankruptcy.'

H. P.

A learned contributor sends a further note on *British and North European Bank* v. *Zalzstein* (see p. 305 above).

The report of the case of *British and North European Bank* v. *Zalzstein*, which appears in [1927] 2 K. B. 92; 96 L. J. K. B. 539, in summarizing the defendant's contention, states that he took the point that the credit entry of £2,000 by the manager of the plaintiff bank was a payment to him *by the plaintiffs*. If this, indeed, had been the point taken, the comment that the defence might fairly be described as impudent is scarcely surprising. The fact, however, that the learned judge thought fit to reserve his judgment upon the points raised might perhaps have suggested that this short summary of the argument was lacking in some material particular. A closer scrutiny of his judgment, to which the reader of the report is referred by the reporter for a full statement of the points raised, shows clearly that the contention was precisely the reverse, namely, that the credit of £2,000 had not been a payment to him *by the plaintiffs*, but by one of their customers.

The facts found by the learned judge were that the bank manager did not want his company (the plaintiffs) or the

auditors to see that the defendant's account was overdrawn; that he had a power of attorney from another customer, a Mr. Rist, which enabled him to draw on Mr. Rist's account; and that he acted upon it by withdrawing from that account £2,000, which he placed to the defendant's credit. This the bank manager did in his own interests, but within his authority from Mr. Rist. Subsequently the bank debited the defendant with £2,000. The defendant was not aware, until afterwards, of these transactions.

Now, clearly, if the defendant had received the credit of £2,000 at the express directions of Mr. Rist, the credit of that amount, though only a book entry, could not have been disputed by Mr. Rist. Again, assuming for the moment that such a book entry would be 'payment' into the defendant's account, it is difficult to see how the bank could have disputed it either, or have been entitled to withdraw subsequently, of their own motion, what was, *ex hypothesi*, intended by them and Mr. Rist, to become the defendant's money.

The position does not appear to be altered in law by the fact that Mr. Rist acted by his attorney, nor by the accident that the attorney was the bank manager. The attorney acted as such and not as manager for the bank. Nor can it make any difference in law that Mr. Rist was also a customer of the bank.

It becomes apparent, therefore, that it was of general and great importance to consider whether a credit entry, made in the above circumstances, can be disputed, or corrected by a subsequent debit, by the bank who had made it. If it can, then a bank, at any time before a customer 'has altered his position' or there has been 'something in the nature of a receipt by him,' may apply a credit which they have been directed to make, and have made to a customer, to any purpose they may please, without complaint from the customer. The proposition is a little startling; and, despite the impudence of the defence, the learned judge who decided the case may be excused for taking time to consider a judgment which, while no doubt defeating what was, in the case before him, an unmeritorious defence, leads, by its implications, to such a result.

THE AMERICAN LAW INSTITUTE AND THE PROJECTED RESTATEMENT OF THE COMMON LAW IN AMERICA.

THE American Law Institute, incorporated in February, 1923, under the laws of the United States relating to the district of Columbia, was the result of a movement originated at meetings of the Association of American Law Schools out of discussions over the existing dissatisfaction with the law and its administration and a recognition of the growing feeling among the members of the legal profession that the bar owed a duty to the public to improve the administration of justice.

The war delayed action, but in 1920 a committee of representatives of the law schools of the country submitted to the annual meeting of the association a report recommending definite action in the creation of a permanent organization for the improvement of the law. A committee of lawyers thereupon was constituted, charged with the preparation of a report on the establishment of such an organization, the work it should carry on and the submission of such report to a representative meeting of the American bar. Mr. Elihu Root was chairman of this committee, which was composed of some forty lawyers and judges, including Judge (now Chief Judge) Cardozo and Judge Pound, of the New York Court of Appeals, Mr. Harlan F. Stone, now associate justice of the United States Supreme Court, Messrs. John W. Davis, William D. Guthrie, John G. Milburn, Victor Morawetz, Dean Pound, of Harvard Law School, and other well-known lawyers, judges and law school professors. With financial aid generously provided by the Carnegie Corporation, a group of scholars was selected by the committee, who devoted several months to the preparation of a report, which, after discussion and criticism by the committee, was finally completed and sent to a selected list of lawyers and judges in different parts of the country, and a meeting was called to be held in Washington, D.C., for the purpose of taking action upon the report and its recommendations.

This report frankly acknowledged the existing dissatisfaction with the administration of justice, which was not confined to that radical section of the community which would overthrow

existing social, economic and political institutions. The report asserted that 'the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.'

The report referred to the fact that with knowledge of the need for improvement in the administration of justice had come a consciousness of the obligation upon the legal profession to take informed action to better conditions. It described the extent and character of the investigation which had been made by the committee and the consideration given to the scope and proper organization of a permanent agency for the improvement of the law and to the work which it should carry on. The two chief defects which the committee found in American law were its uncertainty and its complexity. Among the causes of this uncertainty the report enumerated lack of agreement on the fundamental principles of the common law; lack of precision in the use of terms; conflicting and badly drawn statutes; attempts to distinguish between cases where the facts present no distinction in applicable legal principles; the great volume of recorded decisions; ignorance on the part of lawyers and judges; the number and nature of novel legal questions and uncertainty and complexity due to varying law in different jurisdictions—forty-eight separate States besides the federal jurisdiction.

This is a formidable array, but perhaps the greatest cause of the existing uncertainty and complexity in the law of the United States arises out of the enormous volume of reported decisions of these many jurisdictions, all of which more or less influence each other. As the report pointed out, every State legislature and every State Court of last resort is an independent source of law, while the Courts in one State in determining the law they are called upon to decide are influenced by the decisions of the Courts of other States, or of the federal jurisdiction, in similar cases, even though such decisions are not binding upon them.

The effect of the growing volume of recorded decisions of Courts, and especially of the conflicting decisions of the Courts of the different States of the American Union, has been commented upon for more than a century by judges and lawyers. Mr. Justice Story, in an address to the bar of Suffolk County, Massachusetts, in 1821, referred to 'the mass of the law' as accumulating with an almost incredible rapidity,' and said 'it is

impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists.' Thirty years ago Judge John M. Dillon, author of the classical work on Municipal Corporations, lecturing before the law school of Yale University, said:

> 'There inevitably comes a stage in the legal history of every people when its laws become "so voluminous and vast" that an authoritative and systematic recompilation and restatement of them is necessary, to the end that they may be accessible and of (to use in default of a better, Bentham's uncouth but expressive word) *cognoscible* bulk, if not to those who are governed by them, at least to those whose business it is to advise concerning them and to those whose duty it is to administer and apply them.'[1]

Judge Cardozo recently was moved to exclaim 'the fecundity of our case law would make Malthus stand aghast!'[2] In describing the nature of the judicial process he referred to the field which a judge must explore to discover the rule of decision in any given case as 'the land of mystery.'[3]

Even in England, without the added complications of conflicting decisions of Courts of forty-nine independent sovereignties, readers of the *Law Quarterly* scarcely need be reminded that the same subject has been the object of professional solicitude.

In 1866 a Royal Commission was appointed, known as the 'Digest of Law Commission,' composed of the most eminent lawyers and judges of that day, including, among others, Lord Cranworth, Lord Westbury, Lord Cairns, Lord Hatherley and Lord Selborne.

> 'to inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions.'

In the first report of that Commission, made May 13, 1867, reference was made to the vast number of judicial decisions dispersed through upwards of thirteen hundred volumes, comprising upwards of 100,000 cases, exclusive of 150 volumes of the Irish Courts; besides yearly accessions, all of which the Commissioners characterized as 'a great chaos of judicial legislation.' The remedy suggested by the Commission was as follows:

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[1] The Law and Jurisprudence of England and America, John F. Dillon, 1894, p. 269.
[2] Cardozo, The Growth of the Law, p. 5.
[3] Cardozo, The Nature of the Judicial Process, p. 19.

'A digest correctly framed and revised from time to time would go far to remedy the evils we have pointed out. It would bring the mass of the law within a moderate compass and it would give order and method to the Constituent parts. For a digest (in the sense in which we understand the term to be used in Your Majesty's Commission and in which we use it in this report) would be a condensed summary of the law as it exists, arranged in systematic order, under appropriate titles and subdivisions and divided into distinct articles or propositions which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied. Such a digest would in our opinion be highly beneficial. * * *

'Moreover, such a digest would be the best preparation for a code, if at any future time codification of the law should be resolved on.'

The term 'digest' in this report would seem to express the same idea as that involved in the term 'restatement' as employed in the proceedings leading up to its organization and in those of the American Law Institute. The Royal Commission pointed out that such a work could only be performed by a commission, and would involve considerable expenditure. It recommended that a portion of a digest sufficient in extent to be a fair specimen of the whole should be prepared in the first instance.

The second report of the Royal Commission, submitted May 11, 1870, set forth that, pursuant to the authority granted to it to carry out the recommendations in its first report, the Commission had selected the three subjects of Bills of Exchange, Mortgages, and Easements, and had secured the services of three members of the bar, each of whom was directed to frame a digest of the law on one of those subjects; that these gentlemen had submitted

'"Materials of considerable value," but the Commission thinks it inadvisable to continue this mode of proceeding.

'We have found,' runs the report, 'that the examination and revision of these materials with that rigorous care and accuracy which would be requisite before we could lay them before Your Majesty as specimens of a digest of law, would involve considerable further delay and expense, while, on the other hand, we have satisfied ourselves that these specimens would have again to be revised, and perhaps recast, when the time arrived for inserting them as portions of a complete and systematic work.'

They added that the experiment had served to bring out the inherent difficulties in the undertaking; that,

'a complete digest cannot be executed without the assistance of the most highly-skilled persons whose services can be procured. The success of the work will depend on their efficiency. They must give to the undertaking the whole of their time and energy. And it is obvious that the services of such persons cannot be obtained without the offer of permanent employment and high remuneration.'

The Commission therefore recommended the appointment of a body of three such persons, charged with the duty of executing a digest as a whole, provided with every assistance and acting under the control of a committee of the Privy Council or otherwise. Sir James S. Willes, who, upon the death of Lord Cranworth, had been substituted as a member of the Commission, dissented from the report, because, while he thought a first-rate modern digest of the English law desirable as a whole for professional use, he considered that after all it would be only a makeshift for a code or series of codes, which he thought preferable to a digest.

The movement towards producing a digest or restatement of the common law in England apparently came to an end with that report. Remedies for the conditions described by the Royal Commission seem to have been sought in other directions, such as in improving the system of law reporting; in the careful systematic revision of statutes and the framing of comprehensive Acts of Parliament embracing many subjects which in the United States still are left to the common law.

The failure of the Royal Commission to accomplish its purposes did, however, inspire Lord Halsbury to undertake the preparation and publication of his great work on the laws of England. In the introduction to this work, he says:

'The alteration of existing law and the process of merely stating what the law is, are two very different functions, and the confusion between the two has marred many an effort to get a clear and intelligible code. Mr. Gladstone once said in the House of Commons that you should first get a comprehensive account of what the law is before you commence amending it; and a great many law reformers have failed because they have not observed the necessity of this preliminary inquiry.'

Referring to the failure of the work of the Digest of Law Commission, he says:

'It has occurred to some minds that an attempt might be

made by private enterprise to carry out in its main outlines the scheme which was recommended in the report of the Commission appointed in 1866, and such an attempt has been made in this work. Different treatises upon various divisions of the law, and by different authors, have been brought together, so that a selected body of writers may expound their several topics, and at the same time refer to such authoritative decisions and enactments as support the propositions which they lay down.'

The result, as Lord Halsbury pointed out, was not a mere encyclopaedia, not a mere collection of cases, but a number of treatises composed by learned lawyers, supported by the decisions of great judges.

Probably the same cause may have inspired Mr. Edward Jenks to undertake the publication of his valuable and scholarly 'Digest of the English Civil Law.'

But the tendency in England seems to have been mainly in the direction of reducing the law to statutory form, which Sir John Salmond thought was the general tendency of modern times, and which he believed ultimately would prevail. Yet, as he pointed out,

'the process is one of exceeding difficulty owing to the complexity and elaboration of English legal doctrine. Many portions of the law are not yet ripe for it and premature codification is worse than none at all. * * * Customary law is the principle, and enacted law is merely accessory. The activity of the legislature is called for only on special occasions to do that which lies beyond the constructive or remedial efficacy of the common law.'[4]

While the forty-eight State Legislatures of America, besides the National Congress, are annually putting forth an almost incalculable volume of statutory enactments, the comprehensive codification of the common law has been undertaken in but four States, *viz.* Georgia, North Dakota, South Dakota and California.

The common law of England, which our forefathers brought with them to America as their most precious heritage, moulded and adapted to meet the conditions of their new environment, from the earliest times until the present date, in great measure has governed our expanding and increasingly complex national life. Altered, modified, moulded by judicial decision, sometimes clarified, sometimes obscured by statute, the common law is still the woof and fabric of the law of America, against which

[4] Salmond, The Science of Jurisprudence, s. 53.

statutes often vainly contend and through which they always must be interpreted. The common law, as Lord Bowen once said, is 'an arsenal of common-sense principles.' But with the swelling volume of precedent, the task of ascertaining what the law is in any given case has grown formidable, and coincidentally there has arisen an insistent demand for greater certainty, for better definition and more simplicity in the law. People demand to learn what is the law, not as the result of a law suit, but while actual litigation is yet afar off. They are not content to rest on a bare probability of the judgment which a Court of justice may apply to their acts. They dream of a law to which they may turn with certainty—as clear as the ten Commandments, but less uncompromising in its prohibitions! Judges may be as able as Sir George Jessel 'to take up the confused mass of the law and mould it to the ends of justice,' but the people are not content to await the working out of the judicial process. Hence the multiplicity of statutes, which, unhappily, do not always, or perhaps even in a majority of cases, very satisfactorily clarify the law. As already stated, a few, a very few, of the States of the Union have tried the process of codifying their common law, putting the entire body of that law into statutory form, so that by turning to book and page and section a rule may be found to govern every question arising in social or business life. That they have communicated a zeal for imitation in so few States is perhaps the best answer to the inquiry how successful has been this method. In none of the most densely populated States, those containing the largest cities or the greatest industries, has an attempt been made entirely to supersede the customary or written law by a printed code. The rigidity of statute law presents an unsatisfactory contrast with the flexibility of the common law. Then, too, the uncertainties of the language employed, perhaps resulting from the wealth of its origins, the many differing etymological streams which have blended in the majestic flood of the noble diction of English speech, have rendered statute making in great measure the means of creating new uncertainties, even where the law of custom had become reasonably certain. The fact is, that the English language does not lend itself readily to exact expression of juridical thought, as does the Latin language and those directly derived from it. The classic example of the Statute of Frauds, 29 Car. 2, will sufficiently illustrate this point. If uncertainty of meaning marked such a carefully prepared enactment as the Statute of Frauds, how much more so is it true of the average legislative Act, often framed in haste and without careful study of the existing

state of the law it is meant to affect, or of the precise meaning and application of the words employed in the new enactment.

The report of the committee on the establishment of a permanent organization for the improvement of the law above referred to, stated that a count made in 1917 showed 175,000 pages of reported decisions in the United States as against 7,000 in Great Britain. Mr. Root, in addressing the Washington meeting, said that a count he had had made in the Library of Congress showed that during the five years preceding 1914 over 65,000 decisions had been delivered by Courts of last resort in the States and included in the printed volumes of reports. Upwards of 1,100,000 cases are digested in the Century Digest, the First and Second Decennial Digest, and the twenty-five volumes of the American Digest, covering the period from 1917 to June 1926.

The American Digest (Century Edition), issued by the West Publishing Co., covering the period from 1658 to 1896, is composed of fifty portly volumes, each of which contains from 2,900 to 3,450 page columns, aside from the index. Sixty-three more bulky supplemental volumes bring the series down to the close of 1922, each volume containing about 2,377 pages. These are merely digests or brief summaries of decisions. The National Reporter System for the year 1922 reports decisions in a total of 23,468 cases.[5]

> 'It is not possible, indeed,' said Sir John Salmond, 'for any fully developed body of law to be such that he who runs may read it. Being as it is the reflection within Courts of justice of the complex facts of civilized existence, a very considerable degree of elaboration is inevitable. Nevertheless, the gigantic bulk of bewildering difficulties of our own labyrinthine system, so far beyond anything that is called for by the necessities of the case, partly through the methods of its historical development, and partly through the influence of that love of subtlety which has always been the besetting sin of the legal mind, our law is filled with needless distinctions which add enormously to its bulk and nothing to its value, while they render a great part of it unintelligible to any but the expert.'[6]

[5] Atlantic Reporter, vols. 114-118, 1,700 cases; North-eastern Reporter, vols. 133-136, 1,609 cases; North-western Reporter, vols. 185-190, 2,394 cases; Pacific Reporter, vols. 202-210, 4,133 cases; South-eastern Reporter, vols. 110-114, 2,565 cases; Southern Reporter, vols. 90-93, 2,381 cases; South-western Reporter, vols. 235-244, 4,432 cases; Federal Reporter, vols. 276-284, 2,164 cases; N. Y. Supp. Reporter, vols. 191-196, 1,387 cases; Supreme Court Reporter, vols. 42-43, 703 cases; grand total, 23,468 cases.

[6] Salmond, Jurisprudence, p. 25, s. 10.

This 'avalanche of decisions by tribunals, great and small,' Judge Cardozo has truly said, 'is producing a situation where citation of precedent is tending to count for less and appeal to an informing principle is tending to count for more.' [7]

The committee, on the establishment of a permanent organization for the improvement of the law, reached the conclusion that one of the most potent factors in the removal of the uncertainty of the law would be the preparation of clear and accurate statements in simplified form of the common law on various topics, prepared by trained students of the law, submitted to the criticism of the bar, and published with the authority of the Institute and the prestige of the great body of lawyers and judges of the country. Specifically, they pointed out that the work thus performed was not intended to be submitted to the Legislature for enactment into law. It was designed to appeal to the intelligence of bench and bar. It was believed that if the work be done as designed, the restatements would be accepted by the profession as evidence of what the law is at the date of its publication, without the necessity of ransacking thousands of precedents, as necessarily will have been done by the authors of the respective restatements. Such a restatement should command greater respect and have more authority with bench and bar than standard textbooks the product of individual scholars.

Examples are not lacking of the influence upon the law of the writings of eminent students and text writers. In England, Coke and Blackstone stand out as more essential lawgivers than many Parliaments whose statutes have attempted to end legal debate. Dean Roscoe Pound has very clearly described the great services of Kent and Story in restating and simplifying the common law in America. Referring to Story, whose contribution he considers the greatest, he says:

> 'What Story, the judge, failed in, Story, the text writer, accomplished triumphantly. For more than anything else the books of our great nineteenth century text writers saved the common law. Here were guides for judge and practitioner, well written, learned, well ordered, and as things went then, well reasoned.'

And after enumerating Judge Story's works, he says:

> 'In quantity, in timeliness, and in its relation to the law that went before, and came after, this body of legal writing is in many ways comparable to that of Coke. In each case

[7] Cardozo, Growth of the Law, p. 5.

the judge-made law of the past was restated and was made conveniently and as it were authoritatively available for the future.'

This work, he adds, must be counted as one of the controlling factors in the shaping of American law.[8]

The committee in its report referred to the fact that while the principles of the common law are developed by the slow process of judicial decision, it is not the duty of the Courts to set forth the principles of the common law in an orderly manner, or even to express or explain them, except in connexion with the application of one or more of them to the decision of a particular case. 'To obtain even an approximation of such an agreement on fundamental principles, these would have to be set forth by public authority or by an agency commanding the respect and attention of the Courts.'

Such an agency the report recommended should be created by the lawyers of America.

The restatements are designed not merely to furnish clear and accurate statements of the rules of the common law, but where a divergence of opinion has arisen upon the rule in any given case, to influence the highest Courts of the different States to adopt that rule which on the whole seems to be sustained by the soundest reason. As Judge Cardozo has pointed out,

'The rule of adherence to precedent is applied with less rigidity in the United States than in England, and I think with a rigidity that is diminishing even here. The House of Lords holds itself absolutely bound by its own prior decisions. (*London Street Tramways Co.* v. *London County Council* [1893] A. C. 375, 379.) The United States Supreme Court and the highest Courts of the several States overrule their own prior decisions when manifestly erroneous.'[9]

The report above referred to dealt at length with the character of such an organization as was recommended, the work it should undertake, the qualifications of those who should carry it on, and the estimated annual cost of doing it properly. The following paragraph sums up its recommendations and accurately describes the proposed work:

'A mere academic restatement of the law, whatever its form, will not be sufficient for the undertaking. To fulfil its objects the restatement must have an authority greater than that now accorded to any legal treatise, an authority more

[8] Pound, Judge Story in the making of American Law: 48 Amer. Law Rev. 676.

[9] Cardozo, The Nature of the Judicial Process, p. 158.

nearly on a par with that accorded the decisions of the Courts. To develop among judges and lawyers the feeling that the restatement has this high degree of authority, the work of making the restatement must from its inception be generally recognized as a work carried on by the legal profession in fulfilment of an obligation to the American people, to promote the certainty and simplicity of the law and its adaptation to the needs of life. If this feeling be developed to any considerable degree, it will not only give to the bench and bar a sense of professional responsibility for the character of the work which will go far to insure its excellence, but it will also secure for the work as it is published the position necessary to enable it to accomplish the purposes of its creation.'

The meeting in Washington, called to consider the report above described, was attended by the Chief Justice of the United States (Taft) and two of the Associate Justices of the United States Supreme Court, by five judges of the United States Circuit Courts of Appeals, by judges of twenty-seven of the highest Courts of States of the American Union, besides the President and members of the Council of the American Bar Association and representatives of seventeen State Bar Associations, of thirty-three law schools, of Commissions on Uniform State laws from twenty-two States, as well as by nearly three hundred other lawyers, judges and teachers of law from all parts of the Union. Mr. Elihu Root presided and presented the report of the committee. Pursuant to its recommendations the meeting directed the incorporation of an institute under the name of the American Law Institute, the objects of which should be:

'to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work.'

The incorporators included the Chief Justice of the United States, Mr. Root, the Secretary of State (Charles E. Hughes), the Chief Justices of the Supreme Court and the Court of Appeals of the District of Columbia, and the United States Attorney for the District.

It was provided that the membership of the Institute should include those who had accepted the invitation to attend the Washington meeting and representative lawyers thereafter elected by the Council, besides the following officials, during the continuance of their respective offices: The Chief Justice and Associate Justices of the United States Supreme Court; the Senior Judge of each of the United States Circuit Courts of

Appeals; the Attorney-General and the Solicitor-General of the United States; the Chief Justice of the Court of Appeals of the District of Columbia; the Chief Justice of the highest Court of each of the States; the President of the American Bar Association and the members of its Executive Committee; the President of each State Bar Association; the Dean of each school belonging to the Association of American Law Schools; the President of the American Institute of Criminal Law and Criminology; the President of the American Branch of the International Law Association; the President of the American Judicature Society; the President of the National Conference of Commissioners on Uniform State Laws; and the President of the American Society of International Law. The purpose from the outset has been to have represented in the Institute the leaders of every branch of the legal profession and of all of its organized bodies in all parts of the United States. By-laws were adopted providing for the government of the Institute by a council of thirty-three members divided into three classes to serve three, six and nine years respectively.

A council was chosen composed of men widely representative of the profession in all parts of the country. Mr. Root was elected Honorary President, the writer President, Judge Cardozo, Vice-President, Mr. George Welwood Murray, of New York, Treasurer, and Mr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, as Director and Secretary.

The report of the committee above referred to was debated and its recommendations approved. The council was empowered to take the necessary steps to carry them out. The specific undertaking, to which it was agreed the Institute should primarily devote its efforts, was the preparation of restatements of the more important topics of the common law.

Mr. Root, in presenting the committee's report to the meeting, described the project in the following language:

> 'Now, if you can have the law systematically, scientifically stated, the principles stated by competent men, giving their discussions of the theories upon which their statements are based, giving a presentation and discussion of all the judicial decisions upon which their statements are based, and if such a statement can be revised and criticized and tested by a competent group of lawyers of eminence, and . . . if their conclusions can be submitted to the bar . . . when the work is completed, we will have a statement of the common law of America which will be *prima facie* the basis on which judicial

action will rest; and any lawyer, whose interest in litigation requires him to say that a different view of the law shall be taken, will have upon his shoulders the burden to overturn the statement. Instead of going back through ten thousand cases it will have been done for him; there will be not a conclusive presumption, but a practical *prima facie* statement upon which, unless it is overturned, judgment may rest.' [1]

The report of the committee on the proposed organization of the Institute had pointed out, as did the British Digest of Law Commission, that the work involved in the preparation of a restatement of the law, which should command the respect and secure the support of bench and bar, would require the employment of the most competent members of the profession and the expenditure of a considerable sum of money. With that practical common sense which is characteristic of American lawyers, the framers of the report submitted with it an estimate of the probable cost of carrying on the work in all of its details, and presented a budget showing estimates of annual expenditures amounting to about $100,000. They considered that not less than ten years would be required to cover the more important topics of the law.

Largely through the advocacy of Mr. Root, the Carnegie Corporation had contributed $25,000 to cover the expenses of conducting the preliminary inquiry and of securing the services of those who united in the report on the establishment of a permanent organization, including the expenses of the Washington meeting. Shortly after its corporate organization, the Institute laid its plans before the Carnegie Corporation and solicited its aid in carrying its plans into effect. Again with Mr. Root's potent aid, the Corporation appropriated to the use of the American Law Institute for its general purposes the sum of $1,075,000, to be paid at substantially the rate of $100,000 a year over a period of 11 years.

At a recent date the completion of this payment has been accelerated by increasing the annual payments to $140,000 per annum, the final payment to be made in the spring of 1932.

This gift made it possible for the Institute definitely to organize the work undertaken by it and for that purpose to secure the services of the leading legal scholars of the country. Necessarily, resort was had to the law schools for the men best fitted to carry on such work. The movement, as has been stated,

[1] American Law Institute, Proceedings, vol. i, Account of Proceedings at Organization, p. 51.

originated in the law schools of America and the Institute naturally turned to them for the men qualified for the contemplated task. Professor Samuel Williston, of Harvard University, is perhaps the best known and most highly esteemed law teacher in the country, and the author of a standard work on contracts. He was retained to act as reporter in preparing a restatement on the law of contracts. Scarcely less highly considered is Professor Joseph H. Beale, of the same University. He was retained to act as reporter in preparing a restatement of the conflict of laws. Professor Francis H. Bohlen, of the University of Pennsylvania (later of Harvard), is one of the younger law teachers who has established a high reputation in dealing with the law of torts. He was retained to prepare a restatement of that subject. Professor Floyd R. Mechem, of the Law School of Chicago University, is the author of a standard work on the law of agency. He was accordingly retained to prepare the restatement on that subject. A group of advisers or critics also was selected for each reporter, to whom he was to send the drafts of his restatements as they were produced. It was provided that meetings should be had of each reporter with his advisers, at which the drafts should be discussed and the product then from time to time should be sent to the Council for its consideration, after which the restatements should go to the body of the membership for written comment and suggestions and for discussion at general meetings. Only after completion of this process was a restatement to be put forth with the *imprimatur* of the Institute.

Since this beginning, the director, Dr. Lewis, has undertaken to prepare a restatement of the law of business associations; Professor Harry A. Bigelow, of the University of Chicago, has been appointed reporter to prepare a restatement of the law of property, and Mr. Austin A. Scott, of the Law School of Harvard University, reporter to prepare a restatement of the law of trusts.

The specific form which the restatements should take was the subject of much consideration.

Judge Dillon, in discussing the form which a restatement of the common law of America should take, said:

> '"Mr. Taylor's treatise on evidence contains," says Mr. Justice Stephen, "1,797 pages, refers to 9,000 judicial decisions and cites nearly 750 Acts of Parliament. Greenleaf's work is quite as extensive." Now Mr. Justice Stephen extracts the essential principles of the law of evidence, states these with precision, illustrates them by example, arranges them in a systematic form in 143 articles, all of which, with

annotations and references to the American cases by Professor Chase, is brought within the moderate compass of 245 pages.' [2]

Naturally the question considered by the Institute was whether the formulation adopted by Sir James Stephen in his 'Law of Evidence,' or the method employed by such writers as Dicey and Pollock and Williston should be used. Dicey's 'Digest of the Law of England in reference to the Conflict of Laws,' is composed first of a table of principles and rules covering 60 pages, embracing 203 rules. This is followed by an introduction of 65 pages, 146 pages of preliminary matters, and elaborate notes, the whole making a volume of 952 pages. Sir Frederick Pollock's 'Principles of Contract' (that is, the third American, taken from the seventh British edition) is divided into fourteen chapters, and in all fills an octavo volume of 985 pages. Mr. Williston's 'Law of Contracts' contains three volumes of textbook reading, composed of 2,044 sections, filling 3,456 pages, divided into eight books. The Civil Code of California fills 836 octavo pages, divided into 3,543 sections; the two volumes of the Civil Code of Georgia are made up of 4,639 sections; Lord Halsbury's 'Laws of England' fill twenty-nine volumes of approximately 800 pages each, besides two index volumes. No other code or statement of the law is expressed in the condensed brevity of Stephen's 'Code of Evidence.' These books merely indicated lines of suggestion to the reporters. Very early in the history of the enterprise a conference of the reporters and the director agreed upon a report, which was laid before the Institute, in which it was recommended that the publications of the Institute on any topic should consist of the following parts:

> '(a) the Restatement; (b) the accompanying Treatise, which parts shall be separately printed.
>
> 'That in these restatements the principles shall be stated with such fulness as will afford an adequate presentation of the subject; and the treatises shall contain such amplification and illustration and explanation as shall be necessary for the complete understanding and practical application of the principles.'

At a later conference between the director and the reporters it was agreed that (1) the restatements shall contain principles of law, comment and illustrations; (2) the principles shall be direct and positive statements of law, and shall be printed in separate paragraphs before the formal comment. It was also

[2] Dillon, Law and Jurisprudence of England and America, section xvii.

agreed that irrespective of the arrangement of chapters and parts of chapters, the sections shall be numbered consecutively throughout the topic.

There has been much discussion from time to time as to the form and character of the treatises which are to accompany the respective restatements. It is settled that the restatements are not to be statutes or codes, like the Justinian or the Napoleonic Codes, which were made effective by imperial decree. They are not to be textbooks on the general heads of the law, like those of Blackstone and Kent; nor treatises or serial publications stating the law, with citations of authorities, such as 'Ruling Case Law,' 'Corpus Juris,' or the American 'Cyclopedia of Law and Procedure.' They are to be concrete restatements concisely made, in different sections, of the common law as it is to-day in the United States. The restatements are to be published in separate volumes. The principles are to be direct and positive statements of the law, and are to be printed in separate paragraphs and sections. They will be accompanied by treatises in separate volumes, giving the decisions of the various Courts and citing the authorities in all the state and federal Courts and also containing the reasons for the adoption of the law as set forth in the restatements, and especially, where the decisions of different states are at variance, the reasons for adopting the rule stated. If the objects and purposes of the Law Institute are successfully accomplished, the lawyer will have before him in concise form, in one volume or more, the restatement. In other and separate volumes accompanying the restatement, he will have the treatise, giving all the existing authorities supporting the restatement.

The exact character of the treatises remains to be determined. By direction of the Council, comparatively brief commentaries have been prepared by the reporters to accompany the restatements as sent to the Council or the general meetings. These are, however, merely tentative.

The organizers of the Institute recognized that the work undertaken was novel—almost unprecedented. True, codes of law more or less complete in the past have been prepared by scholars. They were made effective by legislative fiat. Such were the Codes of Theodosius, Justinian and Napoleon. The Civil Code of Germany, prepared by the leading scholars of that land, was nearly twenty years in the making, and was accomplished by the labours of three commissions. It involved a consideration of the varying laws of the twenty-five different states composing the empire and when completed was made law by legislative act. It is, perhaps, nearer to the project of the Institute than any

other work of codification, in the method of its preparation and the character of the work.

The restatements of the American Law Institute require careful consideration of the decisions of the Courts in forty-eight separate states of the American Union, besides those of federal jurisdiction. They must find their sanction in their voluntary acceptance by the bench and the bar, as an accurate statement of the existing common law. Necessarily, to secure this accuracy, the soundest learning and the utmost care and thorough research are required. If only one hundred pages are produced, they must be demonstrably accurate. The value of the work cannot be measured by bulk. In the four years since the work was begun very satisfactory progress has been made. There were submitted to the annual meeting of 1925, tentative drafts of sixty-nine sections of the law of contracts, seventy-seven sections of the law of torts and thirty-two sections of the law of conflict of laws. This was the first substantial batch of restatements which had passed through the Council. There were discussed at the annual meeting in 1926, fifty-six sections of restatement of the law of contracts, covering sixty-eight printed pages and accompanied by twenty-seven pages of commentaries; twenty-eight sections of the law of torts, covering 103 printed pages, and accompanied by thirty-three pages of commentaries; ninety-one sections of the law of conflict of laws, covering 109 printed pages and accompanied by thirty-two pages of commentaries; and 155 sections of the law of agency, covering 144 printed pages.

At the annual meeting held in May of the current year (1927) there were submitted and discussed forty-four sections of the law of contracts, covering sixty-six printed pages, and accompanied by forty-four pages of commentaries; fifty-six sections of the law of torts, covering 137 printed pages and accompanied by seventy-five printed pages of commentaries; 123 sections of the law of torts, covering 166 printed pages and accompanied by forty pages of commentaries, and eighty-four sections of the law of agency, covering 102 printed pages and accompanied by twenty pages of commentaries.

This volume of material has been produced by the continuous labours of about sixty persons—reporters, legal assistants, critics, advisers, a majority of whom are professors and law school instructors, and quite a number of active practitioners and judges. Of this number, forty-four are teachers of law, representing fourteen law schools (in the Universities of California, Chicago, Columbia, Harvard, Illinois, Iowa, Michigan, Minnesota, Nebraska, Pennsylvania, Washington, Wisconsin, Yale

and Stanford). They come from the bars of fifteen states—California, Connecticut, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Pennsylvania, Texas and Wisconsin. It was early recognized that the work which the Institute had undertaken must be done by the scholars of the law, who are generally to be found only in the law schools of the country. It is significant that at the annual meetings of the Institute in 1925, 1926 and 1927, the Deans of more than forty American law schools were present.

During the past year the Institute has solicited and received the active co-operation and assistance of the various state and local bar associations throughout the country, as well as of the students and faculties of the law schools. More than twenty bar associations have appointed committees to co-operate with the Institute, and upwards of four thousand copies of the tentative restatements have been sold by the Institute at approximately the cost of production, besides more than one thousand copies distributed gratis. Helpful suggestions are constantly being received from such committees. There also have been sold during the past year nearly seven thousand copies of the tentative restatements for use in law schools, and these drafts are being discussed between teachers and students, resulting again in helpful suggestions both as to the substance and form of the restatements. By this method it is hoped that the students in the law schools will become accustomed to their use and familiarized with their form and content, so that when they engage in practice they naturally will turn to them for the rule applicable to problems with which they are concerned.

Experience has somewhat modified the method of carrying on the work as originally planned. Instead of the reporters writing the restatements and submitting them to their designated advisers for criticism, the method has resolved itself into frequent group meetings of reporters and advisers at which the sections are discussed almost word by word and often rewritten in conference, so that a restatement which goes to the Council for its consideration is actually a group product. The Institute has no overhead expense for buildings. The expense of the work includes very moderate salaries for the director and the reporters, besides small honorariums to the advisers. The principal items of expense are the travelling expenses and hotel bills of the scholars, many of whom come long distances from their homes to places of meeting; stenographers' fees and the cost of printing.

At the instance of the American Bar Association, the American Institute of Criminal Law and Criminology and the Association of American Law Schools, and with the generous pecuniary assistance of the Laura Spelman Rockefeller Memorial, the Institute has undertaken one special task outside the general scope of its primary object to prepare restatements of the existing common law. This exceptional undertaking is the preparation of a model code of laws and Court rules relating to criminal procedure. The necessity for the preparation of such a code has been pointed out by practically every bar association and committee that recently has undertaken to investigate the administration of the criminal law in America. Before undertaking this work, the Institute appointed a committee to prepare and present to its Council a draft of a survey and statement on the defects in criminal justice. The report of this committee dealt comprehensively with many such defects, some of which were regarded as outside the special province of lawyers to remedy. It specifically recommended the reformation and simplification of criminal procedure, expressing the opinion that the work of preparing a model code of criminal law procedure is of great and immediate importance.

The Institute thereupon appointed a special committee of lawyers and judges to prepare a plan of work for the preparation of such a code, one which would protect the substantial rights of the accused and at the same time prevent miscarriages of justice. Following the above-mentioned grant of the funds necessary to carry on the work, while recognizing that the project was quite at variance with its primary work of preparing a restatement of the existing common law, and would require the preparation of a model statute for enactment—by the legislatures of the various states, the Institute decided to undertake the work. A committee on criminal procedure thereupon was constituted, composed of the members of the executive committee of the Institute *ex officio* and Herbert S. Hadley, Chancellor of Washington University, St. Louis, Missouri, Charles C. Nott, Jr., Judge of the Court of General Sessions of the City of New York, Harry Olsen, Chief Justice of the Municipal Court of Chicago, Illinois, Henry L. Stimson, ex-Secretary of War, Messrs. William E. Mikell, Dean of the Law School of the University of Pennsylvania, and Edwin R. Keedy, Professor of Law at the same law school, were appointed reporters to prepare the draft of such a code. There were afterwards associated with the committee William S. Forrest, of Chicago, Illinois, a lawyer of large experience at the criminal bar, Professors Justin Miller, of the Law School of the

University of Minnesota, John B. Waite, of the Law School of the University of Michigan, Robert W. Millar, of the Law School of North-western University, Illinois, and Tyrrell Williams, of Washington University, Missouri. All of the persons named are either specialists in the criminal law, or men of experience in dealing with criminal law and procedure. The group thus appointed have been engaged continuously in carrying out the duties imposed upon them. Preliminary drafts of the various subjects involved have been prepared by one or the other of the reporters, and then discussed at meetings of the committee and in conference with men who have devoted the best part of their working lives to a comparative study of criminal law and procedure; lawyers who as judges or as counsel for the prosecution or the defence have taken leading parts in not a few of the most celebrated criminal trials in the country. The work has involved a careful study of the conditions of criminal law and procedure in all of the forty-eight states of the Union.

Up to the present time, there have been prepared chapters upon arrest, bail, preliminary hearing, methods of prosecution, grand jury and indictment. When this work is completed, it will be submitted to the criticism of the Council of the Institute, and finally of the general membership. It will not be an attempt to state the existing law, but an undertaking to present a simplified code of procedure which, with such modification as may be necessary to adapt it to peculiar conditions in a given state, may serve as a model for the legislatures of each of the states.

Popular thought in the United States at the present time is more immediately concerned with the criminal law and its enforcement than with the civil law. The reports in the daily press of crimes of violence against the person and crimes against property have inflamed the popular imagination, which has compelled action in many directions. The contribution of the Institute to the effort to meet the great fundamental problem of ensuring the peace and security of the people may be slight, but it will be the endeavour of the Institute to make it valuable so far as it goes.

The model Code of Criminal Procedure will be submitted to the Legislatures of the several states, in the hope that in whole, or in part, it may by them be enacted into law. The restatements of the common law will be submitted to the bench and bar of America, in the hope that they may be accepted as *prima facie* accurate statements of the existing law, thereby facilitating the

task of counsel and Courts in ascertaining the law applicable to cases as they arise. It is the belief of the Institute and its members that this undertaking may be of great service to the profession and the public in making the law more certain and the administration of justice more secure.

George W. Wickersham.

Note.

The following extracts, selected at random, from the restatements on the Law of Contracts, Conflict of Laws and Agency, may be of interest as illustrating the form which the restatements are taking. They are merely extracts from the tentative drafts, and have not been finally adopted by the Institute.

THE LAW OF CONTRACTS.

Chapter I.

Meaning of Terms.

Section 1. A contract is a promise or a set of promises for breach of which the law gives a remedy or the performance of which the law in some indirect way recognizes as a duty.

Comment: A contract may consist of a single promise by one person to another, or mutual promises by two persons to one another; or, there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making a single promise to one or more persons. It is essential, however, for the formation of a single contract that all the promises shall form part of a set. The meaning of this is defined in section —.

It is not practicable in a definition to state all of the operative facts that are necessary or sufficient, or to state all of the legal relations that are created by such facts. These will appear with greater fullness in the succeeding chapters and sections.

It has been pointed out [3] that the word contract is often used to express indifferently:

1. The acts which create the legal relations between the parties;

[3] Corbin's edition of Anson on Contracts, p. 13, note 2.

2. A writing which if not itself such an act is the evidence of such acts;

3. The legal relations resulting from the operative acts.

As the term is used in this restatement, contract includes not only the act of making a promise or promises but the intangible obligations which arise; since promise, under the definition in the following section, includes not merely the act of speaking, but the continuous obligation, whether moral or legal, which a promisor assumes when he makes a promise. The distinction is not made in ordinary legal speech, and is not made in the restatement, between the act of making the promise and the legal obligations which thereupon arise.

Not all the operative acts which are essential to create the legal relations between the parties are included in the definition. It does not attempt to state what acts are essential.[4] When an act is done as the consideration for a unilateral contract (see section 12) and is essential to make the promise obligatory the act is not a part of the promise and hence is not part of the contract as contract is here defined. Similarly, delivery is necessary to make a sealed promise binding, but delivery is not part of the contract.

The term contract is a variable quantity, since as it is commonly used it includes varieties described as void, voidable, unenforceable, formal, informal, express, implied, unilateral, bilateral. In these varieties neither the operative acts of the parties nor the resulting relations are identical.

LAW OF AGENCY.

Book I.

OF THE CREATION AND TERMINATION OF THE RELATION.

Chapter I.

Definitions and Distinctions.

Scope Note.—Only the terms in most common use are herein defined. Many others are defined in subsequent sections in connexion with the subject to which they relate.

Section 1. The subject of Agency includes—

[4] See Treatise, § 1.

(a) Cases wherein the relation of Agency as defined in section 2 exists,

(b) Cases in which the relation of Agency as defined in section 2 does not exist, but in which a person has acted as, or purported to be, the agent of another, or has been represented by another to be his agent, and

(c) Cases in which, though the relation is described as Agency, one person, by the consent of the other, acts primarily for his own protection or for the protection of a third, whom for this purpose he represents.

Section 2. Agency is the consensual relation existing between two persons, by virtue of which one of them is to act for and in behalf of the other and subject to his control.

Comment: It is not practicable in a definition of Agency to state all of the material facts that are necessary or sufficient to create it, or to state all of the legal relations that are created by such facts. These appear with greater fullness in the succeeding chapters and sections.

Agency is consensual in the sense that it depends upon voluntary action, and is not created by law. The consent referred to in the definition is consent to the creation or existence of the relation. The definition does not connote that, given the relation, there must be consent to each act done in pursuance of it. Neither does it connote that there must be a *contract* between the parties.

The consent required may be formally expressed or be inferred or implied from facts. (See sections 42, 43 and 44.)

The control may be actual or potential. The opportunity for its exercise may arise at the time of prescribing the conditions of acting, or at the time of acting, or at both.

Agency is a relation between persons, and therefore the use by a person of physical or non-personal forces or instrumentalities to accomplish his ends, although such forces or instrumentalities are often described as 'agencies,' is not within the range of this statement.

The agency of public officers and agency in international relations are not dealt with as part of this subject.

Situations involving non-consensual representation, such as those created by statute for the services of process against corporations by service upon designated persons, although denominated agency; and situations involving liability imposed upon a husband or father under the guise of an 'agency by necessity' in wife or child, are excluded.

CONFLICT OF LAWS RESTATEMENT.

Part II.

CHOICE OF LAW.

Chapter V.

Status.

Section 126. As used in this subject, a status is a legal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned.

Comment: (a) Status as used in this chapter is a relationship of one person to another (or, in a few cases not now important to discuss, an individual permanent condition created by law, like nobility). One may have an interest in another person in many ways: in a woman whom he desires for his wife; in a child whom he desires to nurture and train, and keep with him; in a friend whom he desires to keep for himself. These desires, or interests, may or may not be made effective by law. Certain relationships, the mutual relationship of the husband and wife, for instance, the law sanctions, and thus creates a status of husband and wife, or more concisely a status of marriage. It is not necessary for the purpose of this subject to enumerate all the kinds of status which our own system and other systems of law create. For the purposes of this chapter, those of chief importance are the status of marriage, the status of parent and child, the status of adoption, and the status of guardianship. The incidents of status, as distinguished from the relationship itself, are discussed in chapter —.

(b) The distinction between a temporary relationship of the sort considered and one not temporary may be most easily illustrated by examples. Mere concubinage is the temporary form of the relationship which when permanent becomes marriage; concubinage begins and ends with the mere will of the parties, marriage begins with a ceremonial or other agreement as prescribed by law and ends with death or with legally controlled divorce. The temporary relationships of principal and agent and of master and servant begin and end with the mere will of the parties; the permanent relation of father and child, or of adoptive father and adopted child, begins either with the creation of a legal situation by the law without regard to the will of the parties, or with a ceremonial

adoption or legitimation, and ends with death. The mere living together of grandparent and orphan grandchild creates the so-called 'natural' guardianship, being dependent at each moment of its continuance on the mere will of the parties, or of one of them; legal guardianship begins and ends only with a judicial act.

(c) The concern of the state in a status as defined in this section is based upon its social interest in the personality of its domiciliaries, and in its interest in such of their domestic relations as have to do with the procreation and nurture of citizens. Its concern is shown by the care with which the relationships are created and guarded by the law; by the social interest in the maintenance of marriage, the oversight of divorce, and of the nurture of children; and by the provisions of law by which these relationships are at every step legally guarded from interference by third persons. The legal establishment of status is a socially important element of the legal order.

(d) The concern of third persons in a status is indicated by the legal requirement that they must take it into account and refrain from disturbance of it. With the temporary relationships, such as concubinage, friendship, agency, partnership, the third person may interfere with impunity, so long as he does not interfere with some property or contract right; but with marriage or guardianship a third person cannot interfere without thereby being guilty of a tort.

Section 127. If a status is created by the law of one state which is not regarded as a status by the law of another state, no effect will be given to the status as such in the second state.

Comment: (a) Several personal conditions or relationships are regarded as status by the civil law, but not by the common law; such are minority, prodigality, and civil death. No effect is given in a common-law state to such a status, unless a statute so provides. The foreign status is however recognized, in so far as recognition is called for; thus it is accepted as affecting rights which arose in a foreign state which gave effect to the status.

Illustration: (a) A is declared a prodigal in France, and B is appointed as his conservator. B takes possession of A's movables, and on A's demand for their return refuses to give them back. A sues B in England for wrongful taking of the chattels. Prodigality is not a status by the law of England. The English Court will recognize the legal

powers in France of the conservator of a prodigal, and give judgment for B.

(b) The status of slavery existed at one time in some states, but not in others. No legal effect was given to slavery in any state by the law of which it did not exist, unless a statute so provided. In the United States, before the Thirteenth Amendment to the Constitution of the United States, that Constitution provided for giving certain effects to slavery even in the free states.

(c) The status of recognized natural child exists by the law of several European states. There being no such status created by the common law, a foreign child having such status will be treated in a state in which the common law prevails no differently from an illegitimate child.

(b) By the law of state X the inheritance tax imposed upon 'strangers in blood' who inherit is at a higher rate than that imposed on inheriting relations. A died domiciled in state Y, bequeathing chattels in state X to C, who, according to the law of Y, is A's recognized natural child. C takes the chattels in state X; he pays an inheritance tax as a stranger in blood.

PRIVATE INSURANCE IN GERMANY.[1]

THE writer of the book under review is the worthy son of a distinguished father, for many years President of the Hanseatic Court of Appeal, well known in this country and on the Continent to all persons interested in international and shipping law. He presided at the Conference of the International Law Association in Hamburg, 1885, in Liverpool, 1890, and in London in the year 1893, and at the meeting of the Comité Maritime Internationale, at Hamburg, in 1902.

The son, like his father, is closely acquainted with English language and literature, and he has in the work under review rendered into good English what he calls 'The German Law on Private Insurance.'

The word 'private' strikes one at once, and reminds one that State insurance, or State-aided insurance, began in Germany. This class of insurance falls outside the scope of the work, which deals only with commercial insurance of all kinds.

Apparently it is the intention of a colleague of Dr. Sieveking's to collect *all* the laws regarding commercial insurance throughout the world, and to reproduce them in German and English, and this work is to form a part of the great undertaking.

It comprehends a group of statutes or laws—an Act relating to the control of private insurance business, passed in 1901, with frequent subsequent amendments; an Act relating to contracts of insurance, passed in 1908, and also since amended; and that portion of the Commercial Code of 1861, which, as amended since, deals with marine insurance.

A perusal of the first Act shows the minute care with which the creation and functioning of companies formed for the purpose of insurance, whether life or otherwise, is regulated, the provisions insuring initial solvency, good management and constant stability, subject to the supervision of a Governmental Department, which apparently exercises all the functions attributed in this country to the Registrar of Joint Stock Companies and to the Board of Trade, and others besides.

The German term for this department Dr. Sieveking has happily translated into 'Board of Control,' a title at one time

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[1] 'German Law of Private Insurance,' by Dr. Alfred Sieveking (London: Stevens & Sons, Ltd.). 8vo. pp. 276. (12*s*. 6*d*. net.)

well known in our constitutional history for that department of our Government which exercised supervision over the East India Company.

This Act has no less than 125 sections, and its provisions are too detailed and too minute for enumeration in a short review. Moreover, they will not be of so much interest to foreigners as the other Acts which Dr. Sieveking has translated.

Next in order would seem to come that which Dr. Sieveking has placed third on his list, but which is historically earlier, the Commercial Code of 1861.

'Arnould on Marine Insurance' and his editors and successors are represented by 218 articles of the Code, and, as far as the writer of this review can judge by a somewhat general investigation, not inadequately represented, and, as translated by Dr. Sieveking, perspicuously stated.

When the law as to subrogation is reached, a provision in the earlier part of the German Code as to the relations between creditor and debtor, which is novel to the writer, has to be reckoned with. Our law allows the bailee of a chattel which has been damaged to avail himself of his partial title, to sue the wrongdoer; but does not, if the owner of the property subject to a bailment or lien sues and recovers in his own right, give the creditor any charge upon the damages recovered. But the German Commercial Code does, and therefore it is specifically provided that when the assured is called upon to assign his claims for damage to the underwriters, this assignment only operates to the extent to which the property is free from charge.

The other Act which Dr. Sieveking has translated is expressed in general terms as an Act relating to all contracts of insurance, and it covers part of what we call marine insurance, namely, navigation on inland waters, a phrase which must be used somewhat largely, as seaworthiness, general average, and voyages are mentioned.

Why insurances on this class of navigation are treated separately does not appear. It is specially provided by section 147 that if insurance is for a voyage partly on sea and partly on land, or by inland water, the rules in the Commercial Code as to marine insurance are generally to prevail.

This is also a long Act—185 sections—codifying all the general principles of insurance, dealing specially with fire insurance, damage done by hail, live stock, inland navigation, and carriage of goods by land, guarantees of solvency, life, and accidents.

An interesting provision in section 15 reminds us that by the general German law a debtor cannot make a valid pledge of provisions, clothes, stock, furniture, utensils or animals, ' in so far as they are required for a decent living and the maintenance of the profession of the debtor.'

By parity of reason the assured cannot assign to his creditor his claim to be reimbursed under a contract of assurance in respect of any of these matters, unless, indeed, the creditor has supplied the debtor ' with other chattels in substitution for those which have been lost or damaged.'

Both under this Act and in cases of marine insurance it seems to be provided that where property which has been insured is assigned, both assignor and assignee are liable for the premium (section 899 of the Commercial Code; section 69 of the Marine Act). It will not often happen in business that an assignee will take an assignment before the premium has been paid, but there may be cases where it is payable by instalments. In such cases this curious provision seems to apply.

To this group of laws Dr. Sieveking has added, almost as if they also had the status of laws, the General Rules of Marine Insurance of 1919, drafted in collaboration with the German Chambers of Commerce, and adopted apparently by all German underwriters.

The writer gathers that these rules are so nearly universally adopted (in ninety-nine cases out of one hundred Dr. Sieveking says) that, unless expression is made to the contrary, they are deemed to be included in all contracts of marine insurance, and occupy therefore a more important position than ' The Stockholm Rules,' framed under the auspices of the International Law Association in 1924, the adoption of which must be expressly stipulated in the contract.

Their existence may in part account for the unwillingness of the Germans to accept the Stockholm Rules.

They form a remarkable document, covering a wide range of law, including such subjects as Insurable Interest, Value, Payment of Premium, Duration of Risk, Disclosure, Subrogation, and Period of Limitation, frequently inserting portions of the Commercial Code, and then adding provisions of their own.

It is the largest instance of legislation by contract of which the writer is aware.

To the text thus constructed Dr. Sieveking has added some useful notes, the whole forming a valuable and, one may say, an unique treatise.

It is most appropriate that a work on the law of insurance

should proceed from the city of Hamburg. At the moment of preparing this article the writer has before him a book which was given to him at Hamburg on the occasion of that meeting of the Comité over which Chief Justice Sieveking presided in 1902. It is called 'Der Stadt Hamburg Assecuranz und Haveren Ordnung auf Befehl eines Hochweisen Raths, publieirt den 10ten Sept. 1731,' and the particular edition was published in 1797. The writer lent his copy to the editor of the *Shipping Gazette*, who published a translation in the issues of February 12, 17, and 19, 1903.

It deals with marine insurance only, and is full of old-world thoughts and expressions. Among the matters of special interest is a policy of life insurance treated as a marine policy, for the duration of a voyage, and a further policy stated to be 'against perils from the Turks and to secure ransom money.'

PHILLIMORE.

WHAT AN OLD REPORTER TOLD ME.[1]

III.

Chancery Appeals.

UNTIL 1851 the Lord Chancellor, besides being a judge of original jurisdiction, was the sole appellate judge in Chancery. The system (now abolished) of having two 'Lords Justices' as appellate judges in Chancery, originated with Lord Truro, and was adopted by Parliament. There had been two evils in the old appellate jurisdiction. One was the delay caused by the Lord Chancellor's other engagements. The second was the fact that he was only a single judge; and that if you wished to appeal from him to the House of Lords, you might even there have again only a single judge. That single judge might even be the Lord Chancellor himself, in which case the so-called appeal would only be a reluctant rehearing. And even if some other law lord did sit with him, yet, should the two not agree, there would be no result at all.

Lord Truro's plan was to make in Chancery a strong appellate Court of three judges, so as to obviate in many cases the necessity of any appeal to the House of Lords. The Lord Chancellor's powers, including that of sitting alone, were preserved intact; so he was under no obligation to summon the Lords Justices to sit with him. On the other hand, the two Lords Justices made a complete Court of Appeal by themselves; indeed, in practice, the Lord Chancellor was often sitting alone in one Court, while the two Lords Justices in an adjoining Court were sitting without him. All appeals were still addressed to the Lord Chancellor; and he determined which of them should be heard by himself, which of them by the Lords Justices, and which (if any) by all three as a 'Full Court of Appeal.' It was well known, both to the bar and to the bench, that the intention of all parties at the passing of the Act was that the three should sit together whenever possible. But during all the Chancellorships from 1851 until 1867 (when I ceased to practise) it was usually found more agreeable to the three judges concerned to make two Courts of Appeal instead of one.

[1] [The 'Old Reporter' was Richard Davis Craig (1810—1884): see p. 170 above.—Ed.]

When the Act first came into operation, a good many appeals stood for hearing from decisions made by the two Lords Justices when Vice-Chancellors; so, as they could not well take part in the hearing of these appeals, Lord Truro sat to hear them. His slowness in this operation, although he was very diligent, consumed over three months. Hence a good many cases, which had been fully argued before him, stood for judgment when he unexpectedly found himself obliged to resign the Great Seal. He kept it for a few days, for the mere purpose of being able to give these judgments. The recollection of this caused a clause in an Act of 1852, by which a retiring Lord Chancellor was empowered to dispose of his arrears of judgments within six further weeks.

Lord Truro was succeeded by Lord St. Leonards; who was not of a nature to 'bear any rival near the throne,' and consequently sat alone during his brief Chancellorship. But the days of his sittings in Chancery were few, for his health was frail. At times he kept his bed; which was part of that system of extreme care by which he preserved his life for more than twenty-two years beyond his Chancellorship, doing little or no work for his pension, but revising his books for new editions, and making and remaking the will and codicils which have given popular celebrity to his memory.

After Lord St. Leonards came Lord Cranworth; and, for some time, the full Court sat daily. He and the two Lords Justices were always on perfectly good personal terms; but it was very soon seen that they were not comfortable. Knight Bruce and Lord Chanworth had formerly sat together as Lords Justices for more than a year, during which time Knight Bruce had been the senior judge, and thus had had the control of the Court in general and of Lord Cranworth in particular. To his arbitrary turn of mind it was not congenial to have anybody over him; and, still less, to have over him a man whom he had been accustomed to have under him. So when the three sat as one Court, Knight Bruce made frequent attempts, perhaps unconsciously, to take the rôle of president of the Court. Conversely, Lord Cranworth was naturally made uncomfortable by having his viceroy over him. Hence, during most of Lord Cranworth's Chancellorship, he nearly always sat separately from the Lords Justices. There was, however, the exception (continued afterwards till Lord Westbury became Chancellor) that when the two Lords Justices, sitting without the Chancellor, differed in opinion, and could not make any compromise of their difficulties, their habit was to request the

Lord Chancellor to allow the case to be re-argued before the full Court of three. Many such cases arose; notwithstanding that the two Lords Justices tried to agree, if they possibly could, lest the credit of their Court should suffer. For neither of them wished that their number should be increased from two to three (as it has been under the Judicature Acts). But a Court of two is a bad tribunal of appeal. The interest of the parties requires that, if the decision of the single judge below is to be either upset or affirmed, it should be done by more than one of two judges of appeal. If the case is so far from clear that one of those two judges thinks the decision below to be wrong, the party defeated below cannot feel satisfied; and yet, as the two judges differ, the decision below still stands.

After Lord Cranworth came Lord Chelmsford, wholly unqualified for deciding either law or practice in a Court of equity. Consequently the two Lords Justices sat with him for some time to coach him in his work, and keep him in leading strings till able to walk alone. After a few months, maturity was supposed to have arrived in Lord Chelmsford's case; and therefore the practice of separate sittings was resumed. Then came Lord Campbell's Chancellorship of two years; in which the course taken in Lord Chelmsford's case, as regards the joint and the separate sittings, was followed. From personal observation as counsel, I recollect how Lord Campbell dealt with appeals when he sat alone. He was ignorant of equity law and practice; and, unlike Brougham, would not set himself to learn them. So his plan, throughout, was a process of scheming. Instead of going to the foundations of the case, in its circumstances and in the law applicable to it, his only concern was to dispose of it somehow or other. Then came the Chancellorship of Lord Westbury; during which (as I know from being in active practice in Chancery throughout it) the full Court of three never once sat. There must have been cases upon which the Lords Justices differed between themselves; but I believe that they never allowed any such differences to appear, lest a rehearing by the three should be seen to be necessary. No such rehearing, nor any other hearing before the three, took place during those four years. Lord Westbury had no desire for the assistance of the Lords Justices; nor had they any desire for his. In truth, it was well known that the self-restraint which all three—and especially Knight Bruce—must have put upon themselves if they had sat together, was greater than it would have been possible for them to keep up. It would not be at all too strong language if I were to say that the Chancellor hated each of the Lords

Justices,' and that each of the Lords Justices hated the Chancellor.

'Authorized' Reports.

The modern system of law-reporting—as it stood before the present system of one series of reports in all Courts began in January 1866—may be said to have commenced with the 'Term Reports' by Durnford and East in 1785. These were, I believe, the speculation of a bookseller. When I became a law reporter in 1835 the King's Bench Reports still belonged to the same firm of booksellers—Whieldon, afterwards Butterworth. Mr. East, of these eight volumes of Durnford and East, was also the East of the sixteen volumes of reports which formed a continuation of them. *Mirabile dictu*, he survived all those twenty-four volumes long enough to go out to India and become Chief Justice of Bengal, and afterwards to come home and be made a Privy Councillor and sit upon Indian Appeals.

No doubt Durnford and East and also East obtained the 'authorization' of their reports, as it was then understood; that is, the sanction and also assistance of the judges of the Court. It was not at all usual then for written judgments to be given. Certainly whenever all the judges of the King's Bench, or even when more than one of them, gave separate judgments, their expositions would be oral only.

The cases in which (if at all) the judgment would be written were cases in which one judge delivered it as being the decision of the whole Court. In those cases it would have been written, (by the one most familiar with the subject or by the junior); and would have been sent round for approval, (except in small cases, such as questions of practice or of settlement of paupers). I, of course, distinguish cases in which there was a difference of opinion on the bench and in which, therefore, the judge last made (or the junior in rank) gave his opinion first—and so on to the top. In those cases, if the decision was given immediately upon the argument, it would not be written. And even in cases where it was given after taking time to consider, if the judges could not agree, the separate judgments would probably be oral. For till late in George IV's reign written judgments were not read in Court either by one judge or by all. The habit of giving written judgments began about 1827 in the King's Bench, which was then *facile princeps* among the common law Courts in respect both of authority and of extent of business.

When a judgment was written, the judges gave the original MS. or a copy of it (usually the original) to the accustomed reporters of the Court. No doubt Durnford and East secured the promise of such judicial assistance when they made their arrangements with their publishers. Whatever assistance was given to them would naturally be continued to East and to his successors down to the new system of 1866; yet with this qualification, viz., that until after Lord Denman became Lord Chief Justice in 1832, the written judgments of the judges of the King's Bench had never been given to any other reporters than those 'regular' ones of whom I am speaking. But after his accession, the Court determined to give their notes also to a contemporaneous set of two joint reporters, Manning and Ryland, who had for some years maintained a concurrent series of reports in the same Court although without judicial assistance.

Doubtless, in cases where written judgments were not delivered, the King's Bench gave their notes of the argument to the regular reporters of the Court, whenever requested so to do. Probably they even revised their judgments in the proof-sheets. It was this kind of help that, down to 1866, constituted 'authorization.' Such help was never announced to the world; but was always perfectly well known.

The usual arrangement between publishers and reporters was that the publishers undertook to buy the copyright at so much per sheet, taking all risk and paying all expenses of printing. But they required the reporters to correct the press; thus giving them the opportunity of making alterations. It was left entirely to the discretion of the reporters to decide what cases they would report. There was a possible evil in this width of discretion. For reporters in very little private practice might be tempted to report too many cases; whilst reporters in large practice might be tempted to leave unreported some minor cases that really deserved a chronicle. But in practice these temptations seldom took effect.

If the judges corrected the proof-sheets, they might alter the reasons given in print from those given in Court; and this possibility was said to have been made a reality in one Court, but, I think, never in the King's Bench. I am bound to say that some judges in my time, and perhaps some since, have on revision so altered their judgments as to treat their reporters as merely their personal chattels. When Sir John Leach was Master of the Rolls, he used to send to Mylne a handsome book containing a record of his oral judgments (which were concise and incisive and clever) with a request that they should be

printed from it. But the record sometimes differed materially from the judgment that he had delivered in Court. Hence, in reporting Lord Cottenham, Mylne and I gave him no opportunity of altering, or even seeing, our intended report. Nor did we ever ask him what cases he would like to be reported. We relied on the usual two tests of 'reportability'—does the case involve either any new principle or any special application of an old one?

Joint authorship on the title page of a volume of reports does not always imply joint work. But all the six volumes in which I collaborated are thoroughly joint work. One man prepared the report, and the other revised it, both by himself, and also by reading aloud to the other, under that other's severest criticism. For there was no editor to revise; and it is scarcely possible for one man alone to avoid omissions, *non sequiturs*, and mistakes. No man who has not only been a reporter but has also had his reporting work mercilessly criticised by a colleague can have any idea how difficult the duty is.

The reports that best repay studying are those of the House of Lords. There are the advantages of (1) their finality, (2) their being so well argued at the bar, and (3) the exceptionally skilful statement of the facts—the Case having been settled not by the junior counsel alone but by all the counsel in consultation.

Newspaper Reports.

It is generally considered to be the duty of a judge to hear any report purporting to be written by a practising barrister (that is, a barrister in the habit of constant attendance in Court), and published with his name. But it is a duty 'of imperfect obligation' and sometimes arbitrarily declined. My own experience however was that although the judges of first instance, for example Vice-Chancellors, often refused to look at some unusual report (for instance, one in an ephemeral periodical), yet that the Court of Appeal never took on itself the responsibility of disregarding such a case.

The Authority of Judicial Decisions.

The rules on this subject are complex, and are subject to qualifications and exceptions. But the fundamental rule is '*Stare decisis.*'

That rule is applied the most stringently when a Court is bound by some former case that was decided by itself; whether

decided in the persons of its present judges or of their predecessors. And it is applied especially stringently when the earlier decision occurred in some previous stage of the same litigation. There it must be considered absolute. And even when the former decision was in a cause between other parties than the present litigants, it still is the duty of the Court, as a general rule, to decide the question in the same way in which it was formerly decided. This is so even if the judges on the former occasion were not the same persons as constitute the present Court; (always assuming, of course, that the prior decision has not meanwhile been reversed on appeal).

But even this rule is not inflexible, nor of unlimited duration. When subsequent judges disapprove of the decisions of their predecessors sitting in the same place, they struggle to find out distinctions between the precedent and the present case. In doing this, they often carry their refinements so far as to make 'a distinction without a difference.' Yet if this cannot be done, they usually declare themselves bound by the authority of the previous case, and decide accordingly, but give an intimation of their inward dissent from the order they pronounce; and thus an appeal is at least suggested. Whether the suggestion shall be acted upon depends on the value of the question at stake, and on the opinion of counsel as to whether the views of the appellate judges are likely to make the risk of the expense worth while.

Sometimes, however, when a decision has been very generally thought mistaken or has been found inconvenient in practice, but yet has never been reviewed upon appeal, the very Court whose predecessors have made it may pluck up sufficient courage to overrule it. Still such cases are rare; and they can be justified only by such circumstances as I have already mentioned, along with the additional circumstance that no Court of original (as distinguished from appellate) jurisdiction could with propriety overrule it, except the Court in which it originated.

Less obligatory is the duty of a tribunal to decide in accord with a previous decision of some co-ordinate Court. For this depends in some degree upon the lapse of time since that decision was pronounced. If it be of long standing, it has practically made the law; and the present judge ought to decide in accordance with it. For otherwise he may retrospectively make doubtful the rights of many persons; and the more painfully doubtful because in their case the time available for testing the doubt may have passed. Accordingly he decides in conformity with the precedent. But if he thinks the precedent unjust or

inaccurate in principle, he may probably declare his opinion to that effect; for the double purpose of encouraging an appeal (either in the case before him or in some subsequent one), and of guarding his own reputation from his being understood to acquiesce in that previous determination. Sometimes this kind of disapprobation by judges of what they feel themselves obliged to decide, continues through many utterances before the question is ever brought before a Court of appeal.

If, on the other hand, the former decision of a co-ordinate Court be recent, it is open to a judge who cannot agree with it, either to decide in accordance with it or, without any impropriety, to decide in opposition to it and so make an appeal almost inevitable. Cases decided on the eve of the Long Vacation are always open to suspicion, unless the judgment given in them is one for which time had been taken a good while before. It is not an admitted objection to a decision that it was made so late in the legal year and without time taken for consideration. But it is a reason for weakening such a decision; and a significant allusion to the date, if skilfully made, will often have much influence on a judge's mind. Lord Justice Knight Bruce greatly disliked the date being referred to when counsel quoted to him any decision of his own; for he professed to give just as much attention on the last day of the legal year as on the first. But I have heard Lord Cottenham say, with reference to some case he meant to disregard or overrule, 'The date of that case—August—perhaps explains it.'

A Court of appeal is of course under no obligation to refuse to overrule the decisions of Courts inferior to itself. Yet in practice it often does so refuse, if the former decision is of long standing and has been meanwhile followed by several judges. I well remember reporting in Mylne and Craig a case in which Lord Cottenham said that a certain decision had remained unreversed so long that, if reversed now, it ought to be reversed not by him but by the House of Lords. Upon the like principle the Court of Appeal in *Adams* v. *Angell* (5 Ch. D. 634) refused to disturb the authority of an old case of *Toulmin* v. *Steere*, decided by Sir Wm. Grant in former days (3 Mer. 210), as to the priority of mortgages; because the case had been considered for sixty years to be binding law. Yet they evidently wished it had been out of their way. Hence they took trouble to show that the case then before them was not exactly the same in circumstances, and therefore they could hold that *Toulmin* v. *Steere* did not apply to it.

Even the House of Lords, when they like so to do, will treat

as established law cases of inferior Courts which have created a well-understood rule. Of this you will find an instance in *Foley* v. *Hill* in which I was counsel (2 H. L. C. 28). The point which the Lords there treated as established was that the relation between banker and customer is merely that of debtor and creditor; and is not of a fiduciary character like that of trustee and *cestui que trust*, or of principal and agent, or of landlord and steward.

On the other hand, willingness in a Court of appeal to overrule an obnoxious decision of an inferior Court, even when it has stood many years unappealed from, and many other cases have been decided on its authority (though with reluctance) by other judges, is exemplified by another case in which I was concerned, *Taylor* v. *Taylor* (3 De G. M. & G. 190). In it, Lord Cranworth overruled the decision of Sir John Leach in *Phillips* v. *Phillips* (1 M. & K. 649). The point was whether the produce of land directed by a will to be sold, but which lapsed because the donee thereof died in the testator's lifetime, resulted to the heir or to the next-of-kin. The case was very hotly contested between the Solicitor-General (afterwards Lord Westbury) as leading counsel for the next-of-kin, and myself as leading counsel for the testator's co-heiresses. The old decision in favour of the next-of-kin was overruled. A much more famous instance of a Court of appeal overruling a long-established decision is the case of *Godsall* v. *Boldero* (9 East, 72) which had been decided in 1807. Godsall (a coachmaker in Long Acre) had insured in the Pelican Insurance Company the life of Mr. Pitt, who was in debt to him. Pitt's debts were paid by the nation after his death; and Godsall's claim was paid amongst them. But he, notwithstanding, claimed his insurance money. The insurance company, whose agent Boldero was, resisted his demand; on the ground that by statute law Godsall could not legally have insured a life unless he had had an 'interest' in it. They urged that the true meaning of the statute and the general principle of life insurance must be—as in marine and in fire insurance—the principle of Indemnity only; (yet death, unlike shipwreck and conflagration, is an event not contingent but inevitable). Clearly Godsall, having been paid in full by the nation, had sustained no such loss as that against which the policy had indemnified him. The Court of King's Bench decided in favour of the company's contention; so nothing was recovered from them. The decision was not appealed from; and the case itself was considered to be binding law for nearly fifty years. Yet, in practice, insurance companies

found it to be to their advantage to disregard it by paying sums insured upon the lives of debtors, even when the insurers had, before the debtors' deaths, ceased to have a legally insurable interest. Hence it became in course of time a matter of good faith, as between man and man, that an insurance company should make the payment if they had received premiums of insurance after the legal interest had ceased. But at last in 1854 an insurance company set up *Godsall* v. *Boldero* as the defence to a demand for a sum insured. Hence an action, *Dalby* v. *India and London Life Assurance Co.* (15 C. B. 364), was brought upon the policy; and in it the decision in *Godsall* v. *Boldero* was overruled by the Court of error, as having been founded on a mistaken analogy with marine and fire insurance.

Nevertheless an overruling does not, in theory, change the law, but only vindicates and re-asserts it. I remember, when arguing Underwood's case before the Lords Justices in 1854, mentioning that a decision hostile to my client (*Hutton* v. *Upfill*) had recently been overruled by the House of Lords; and I said 'the law has now been altered.' Lord Justice Turner at once took me up sharply, with the words, 'You are not to say that the law has been altered, you are to say that the law is now otherwise understood.'

Judges advising the House of Lords.

The opinions of judges given in the House of Lords upon a legislative proceeding would not be entitled to conclusive weight in a subsequent judicial proceeding. For they would have been given without hearing counsel on the other side. A proper and a well-maintained jealousy refuses to give importance to any judicial opinion not preceded by the arguments of counsel. The solemnity of the occasion, and the number of judges consulted, would not necessarily be greater than on the occasions on which the judges are called in to assist the House of Lords by their opinion in a *judicial* proceeding.

Under the Judicature Act not only the common law judges but all the judges of the Supreme Court will be called in to give this assistance. It would be the duty of all these judges to attend in answer to the writ, if they could; but very rarely have all been able to attend. After 1830, when the twelve were increased to fifteen, excuses arising out of other public engagements were more frequently made; and more frequently allowed. Before the Judicature Act the Chancery judges were never summoned. It would have been better, sometimes, if they had been; for

upon Irish Chancery appeals the presence of English Chancery judges, as advisers, would have been useful. It was once my fate to have to argue as leader, at the bar of the House of Lords, in support of a twice-considered judgment of the Lord Chancellor of Ireland, before two common law peers, who formed the whole House. They had not the slightest notion of the purely equitable principles upon which the judgment was based. They upset it; and upon a common law technicality.

There are five different kinds of proceedings upon which the House of Lords has exercised its right to the assistance of the judges:—

(1) Writs of error from common law judgments.
(2) Trials of peers or peeresses.
(3) Impeachments of public functionaries.
(4) Bills of attainder, or of pains and penalties.
(5) Legislative proceedings of a general nature.

Upon the first four of these, counsel would appear and argue all necessary questions. Impeachments would, indeed, not be supported by counsel as such, but by members of the House of Commons appointed as 'managers' for the whole House. But still, lawyers would be likely to be chosen as managers, if questions of law were likely to arise. Counsel could, of course, appear for the person impeached. Hence it may be considered that upon these occasions any opinions of the judges would have been preceded by the arguments of counsel; and therefore would be entitled to great weight. Nevertheless they would not be actual authorities, unless adopted by the House of Lords itself. In several modern cases, upon writs of error, the House has not adopted the opinion of the majority of the judges. I have heard that in one or two cases it even decided in opposition to the unanimous opinion of the judges. But whenever the House has adopted the judges' opinions (whether by concurring in them as the basis of its own judgment, or by acting upon them, as in the admission or rejection of evidence), the opinions so given by the judges do become authoritative in future judicial proceedings. So again the opinions given in the proceedings against Queen Caroline in 1820—which, though technically 'legislative,' did take the form of a regular judicial trial—have constantly been referred to as of good authority. As to No. 5, the only instance I remember of the judges being consulted by the House of Lords with reference to general legislation, was that of the Clergy Reserves in Canada, early in Queen Victoria's reign. These Reserves were certain lands which had been set apart by an English statute in 1790 as a provision for 'a

Protestant clergy,' at a time at which there already were in Canada clergymen both of the Established Church of England and of the Established Church of Scotland. The English law officers advised in 1819 that 'clergy' would not cover the ministers of any *un*-established church. There subsequently came before Parliament a proposed measure about those lands. So the question arose as to who were the 'Protestant clergy' for whose benefit the lands had been reserved. The Bishop of Exeter insisted that the clergy of the Church of England were alone intended. Thereupon the judges were consulted by the House of Lords, and they gave an opinion that the words did include those of the Church of Scotland also.

Irish and American Decisions.

Cases adjudged in Ireland are not cited, I fear, so often as they merit. But they do not deserve quoting so often as they might deserve it with a little more attention to accuracy on the part of the Irish judges. There have been several instances in this century of eminent English lawyers being made Lord Chancellors of Ireland. Lord Redesdale and Lord St. Leonards are the most important of these. Lord Redesdale's decisions, as reported by Schoales and Lefroy, are of high authority, and have been constantly cited both by the bar and the bench in our English Court of Chancery. Lord St. Leonards' decisions (the reporters whereof were understood to have the benefit of his corrections) were seldom quoted in proportion to his eminence; because they were more confined to Irish subjects and to mere questions of fact than English lawyers like. But they are quite good materials for argument, as far as they go. Some, too, of those Irish judges who were also Irishmen have been men of judicial mind and very useful as authorities; but I have not often known them quoted. The most eminent of them in modern times was probably Mr. Blackburne, a man of first-rate abilities, who twice was Lord Chancellor. His decisions were cited with approbation in England by Lords Justices Knight Bruce and Turner. But no English judge is obliged to listen to Irish cases if he does not like to do so: and I have known some judges who did not like to do it. But they are decidedly quotable if clearly in point.

A judge does sometimes found himself upon an American decision, but this is rare. For I have found very few judges take so wide a range in their reading as to include American reports, still less to incur the expense of keeping up a series of

them. Lord Cairns, however, valued American cases, and used to complain that Lincoln's Inn Library did not possess more of them. Lord Wensleydale, too, who was an insatiable reader of everything connected with law, was fond of quoting them.

Textbooks.

Very few textbooks, even when recognized as quotable, bind a judge to accord with the quotation. 'Coke upon Littleton' is (with very slight exceptions) of binding obligation; so that, if a judge decides in opposition to it, he ought to be appealed from. And I found 'Blackstone's Commentaries' in the text of the author, (not in the words of his annotators), to be in most of its parts not only quotable, but received and adopted as authority. Blackstone, however, made many changes in his text during his life. Another instance is that of Mr. Thomas Jarman, whose book upon 'Wills' may now, since his death, be considered of high authority in its original text (not in the notes and additions of its editors). Some judges did allow it to be relied on in argument even during his life. He begins the first edition of it by saying that since he had published a similar work, under another title seventeen years before, his views on many points of testamentary law had been much changed. That earlier work was a new edition of 'Powell on Devises.' In the notes to it Jarman had expressed many opinions which were practically acted upon in the chambers of conveyancing counsel, and were occasionally even cited in argument in the Courts before the book upon 'Wills' was published.

To the rule that the author should be dead, I have sometimes seen an exception made when he has become a judge. And the exception is made more readily if he has announced that he has finally revised the book as much as he intends ever to revise it. An instance of this was Lord Redesdale's book on 'Pleading,' a book of the highest authority in its subject. It was not only quoted in argument, but was relied upon by the Bench throughout Lord Eldon's twenty-five years of chancellorship. But in even the best textbooks a distinction between passages has to be drawn. When the author lays down a proposition as the result of his own experience and cites no other book, his statement may be authoritative. But when he does cite another book (usually a reported decision) his statement is not to be taken for more than will appear upon a reference to the citation.

Sometimes treatises that are useful manuals of the law upon questions which often arise are allowed to be quoted on circuit

(where many books may not be accessible); and are acted upon by the judge. 'Phillips on Evidence' used to be an instance of this; for every day on circuit it was quoted and acted on even during many years of the author's life, after he had left the Bar and become an Under-secretary of State. I remember Serjeant Byles arguing, before the Court of Common Pleas, a question upon the law of bills of exchange, upon which he had written his well-known book. But one of the judges on the Bench (Maule J.) turned to this book which was lying beside him, and said: 'I find that, in "Byles on Bills," the law is laid down the other way.' Whereupon poor Byles had to get out of the difficulty as best he could.

I have even known a judge quote, in a deliberate judgment, a passage from 'Lewin on Trusts,' the author of which was still living and in practice, and sometimes argued cases in that very same Court. But this we thought surprising and irregular; and so it was. On the other hand, I have heard a counsel urge a conclusion which Jarman, in his book on 'Wills,' had arrived at as the laborious result of much uncertainty, and receive from a most eminent judge the reply: 'Well, what is that but the mere opinion of a very learned person?'

Below textbooks are the Opinions given by counsel. I have never known judges allow the quotation of a mere opinion of any counsel, even though he were dead. I have indeed heard the old and obscure book called 'Cases and Opinions of eminent Counsel' once or twice referred to, but it is a book of no real value. A conclusive objection to quoting the ordinary opinions which counsel give when consulted is that they have had no opportunity of hearing argument on the other side; and another objection would be that the turn of the opinion is often influenced by inaccurate statements in the case itself.

COURTNEY KENNY.

ARRESTMENT: A COMPARATIVE SKETCH.

QUITE a stir was created recently by the announcement that the Government had appointed a committee, under the presidency of Mr. Justice Hill, to inquire into the possibility and advisability of the introduction into English law of a mode of procedure similar to or co-extensive with what is known in Scotch law as Arrestment on the Dependence. It is only fair to state that the news was not received in legal circles with anything approaching enthusiasm. Various arguments were immediately advanced against what the Government was proposing to introduce, although nobody seemed to know quite what it was that was intended, and only a few understood the effect of arrestment on the dependence. So much only seemed reasonably clear that rules were, possibly, to be introduced to enable an inland plaintiff to safeguard himself against an alien defendant removing his property out of the jurisdiction before judgment, thereby rendering such judgment abortive. It is to be hoped, however, that the scope of the committee will not be restricted to one aspect of a case which recurs in other variants. From a practical point of view, there appears to be no material difference between the dishonest alien who takes himself and his belongings out of the country, and, incidentally, out of the jurisdiction, and the defendant, ordinarily resident and even domiciled in England, who, when the draught becomes too strong, disappears somewhere in London's eight millions, leaving the successful plaintiff to frame his judgment, and, more often nilly than willy, to pay the bill.

One should have thought that simple considerations of this kind would have appealed to the average practitioner, and would have induced him to go more deeply into the problem. Far from it, however. He opposed the possible new introduction on a number of grounds, not one of which can, with profound respect, be deemed safe and sound. Perhaps the least acceptable of all is the argument that such procedure would be foreign to the principles of English law. This savours very strongly of an *ignoratio elenchi*, and is easily refuted by saying that not every institution of English law is of indigenous growth. The Legitimacy and the Adoption of Children Acts are very recent instances of importations from other systems of law.

Again, it has been said that a system of arrestment might very conceivably damage our foreign trade. The answer is that most European countries know the system already, that it forms part of the law of their civil procedure, that it seems to work to satisfaction, and that no evidence has yet been received of the intention to abolish it anywhere. It is impossible to see how any country could grudge England a system which is being enjoyed in that country, sometimes with unpleasant consequences to English traders.

More force may be said to attach to the argument that the system might work injustice. But surely, if the system should be deemed worthy of introduction in England, it ought to be a very simple matter to provide safeguards against that contingency. In fact, other law systems already contain provisions for the protection of defendants where arrestment might cause hardship.

So much shortly for the arguments advanced against the introduction of the system in England. The case *for* the system has been so lucidly and admirably made out by Lord Dunedin[1] that any attempt to improve on his statement would be not only futile but presuming. An attempt will, however, be made to summarize the law relating to the subject as it prevails in Germany, where arrestments form part of the everyday routine of the practitioner.

The law on the subject may be found in section 5 of the 8th Book of the German Code of Civil Procedure, under the heading of 'Arrestment and Interlocutory Injunction.' Of the latter nothing further need be said here; it corresponds largely to the procedure contained in Order 50, Rule Ia *et seq.* The object of 'arrestment' is to ensure that subsequent execution on a judgment, when obtained, shall not be abortive. For this reason, it is often termed 'anticipatory execution,' but it must be clearly borne in mind that an arrestment does not and cannot deal with the merits of the case, very often for the simple reason that it is granted before action brought.

There are two forms of arrestment—one called real, and the other personal. Section 916 *l.c.* provides that an arrestment may be granted to ensure execution into the real or personal property of a person, in respect of a liquidated claim or any other claim which may become liquidated, irrespective of whether the claim be present or future, certain or contingent. Section 917 *l.c.* provides that real arrestment may be granted where there

[1] In the *Law Journal*, August 6, 1927, Vol. LXIV, p. 111.

is reasonable apprehension that without it a judgment could not be enforced at all, or only with special difficulty, and in particular where *the judgment would have to be enforced abroad.* The last ground deserves particular attention, as it probably contains the strongest argument in favour of the system. It must be remembered that not all members of the Brotherhood of Nations facilitate the enforcement of foreign judgments as much as England does. In Germany, in particular, an English judgment is, *qua* judgment, a nullity; but even in other countries, more particularly those which are under the influence of the Code Civil, the famous (or notorious) 'ordre public rule' may prove a fatal stumbling block to the enforcement of an English (or other foreign) judgment. It seems, therefore, to be an advantage to be able, where a defendant is an alien, or is removing his property out of the jurisdiction, to stop him, or, in other words, to 'arrest' the property. It is important to note, however, that the mere fact that the defendant or intended defendant is an alien, is not a ground justifying an arrestment, if he has sufficient property within the jurisdiction and is not on the point of removing it.

It is now clear that arrestment is a means to arrest property and to prevent its removal. In this sense, the Code speaks of a 'real' arrest. There is, however, another means of achieving the same object, and this is termed the 'personal' arrest. In this case not the property is arrested, but the person, *i.e.*, the defendant or intended defendant who attempts to remove the property. The Code says that personal security arrest shall be granted when necessary to secure a jeopardised execution (section 918). It is perhaps important to deal a little more fully with this form of arrestment, or, as it might well be termed in the circumstances, personal arrest.

The chief thing to remember is that a personal arrest is only permissible to secure an execution which is, or will be, in jeopardy. In other words, it is as necessary here as in the case of a real arrest, that property which may serve to satisfy a judgment is being tampered with to the detriment of the creditor or plaintiff. In no case can a defendant, whether alien or German, be arrested to compel him to produce or set aside property which shall be available for execution. Statements to this effect were made a year or two ago, on the occasion of a sensational film case. They were, of course, quite wrong. No Englishman need hesitate to go to Germany merely for fear that he might be arrested for owing a German money. Such a personal arrest can only take place where it is proven to the

satisfaction of the Court that the debtor or defendant *has actually got property in Germany and that he is trying to take it out of the country,* or to *hide it effectively.* Thus, if the particular Englishman were proven to be selling his furniture or other goods in Germany, or collecting his book-debts post-haste, say at a heavy discount for cash, then he might be locked up; but only if no other means to safeguard the property are available, or, shortly, if it cannot be arrested. Two things follow from these principles—a defendant cannot be compelled, by a personal arrest, to *produce* property in order to satisfy a future judgment; and, further, a personal arrest will only be granted if absolutely nothing short of it will suffice to protect the property.

In order to obtain an arrestment—which term must hereafter be taken throughout to include both real and personal arrest—an application to the competent Court is necessary. The application must contain full particulars of the claim and the conduct of the other party giving rise to the apprehension that property is being tampered with. All statements relating hereto must be 'credibly asserted': this probably means, and is usually done, in the form of a statement in lieu of oath, something closely akin to a statutory declaration (section 920). The Court competent to deal with the application may be either that before which an action between the parties is already pending, or, where this is not the case, the Court within the territory of which the jeopardised property is situate or the person to be arrested may at that time be found (section 919). (It is noteworthy that the section does not refer to residence or the like!) Where an action is not yet pending, the Court must, if it grants the arrestment, at the same time order the applicant to commence proceedings within such period as it deems adequate (section 926).

The Court may deal with the application in either of two ways. If the facts are quite clear, it may make an order for arrestment forthwith; if not, it will make an order for the application to be heard and argued in open Court. It is in the discretion of the Court to order the applicant to give security, before the arrestment becomes effective, but such an order will, as a rule, only be made where the case is a doubtful one, which, speed being of the essence of the whole institution, it may, of course, occasionally be (section 921).

The order must contain one very important thing: it must specify a sum of money, by depositing which the defendant can prevent the order being enforced. It should be noted that only by depositing a sum of money can the defendant avoid the order; security in any other form is not accepted. The amount

is in the discretion of the Court. Where the claim is a very large one the cash sum will be smaller, usually representing as near as can be the value of the property to be arrested. For, it must always be remembered, the object of arrestment is not to pay the creditor in advance, but merely to tie up property for a possible execution in the future (section 923).

If the Court grants the application, the successful applicant can immediately take steps to make it effective, in a manner hereafter to be set out. Before proceeding to do so, it is perhaps as well to define the position of the other side.

The order of arrestment must be served on the debtor-defendant not later than one month after its date (sections 922, 929, sub-section 2). In the majority of cases, however, it would hardly be wise to serve the debtor before putting the order into force. The creditor may, therefore, if he so chooses, enforce the order before service, but any steps taken to enforce it will be invalid unless the order is served within eight days after its enforcement, provided always that the month has not elapsed (section 929, sub-section 3).

Immediately after service of the order the debtor may protest against it by serving the creditor with a notice of hearing, which notice must set out the grounds on which the debtor proposes to oppose the order. Notwithstanding notice, the creditor may, however, proceed to execution, which he does at his risk (section 924). At the hearing the Court may make such order as it deems expedient in the circumstances (section 925). Even after the order has been confirmed, the Court may still, on sufficient cause being shown, rescind the order, particularly if the debtor has deposited the sum of money required in the order (section 928).

Finally, we come to the means by which an order for arrestment can be enforced. They are, generally speaking, identical with those employed to enforce a final judgment. Personal property is seized by the sheriff and held until the action has been decided. Debts are bound in the hands of third persons by garnishee proceedings, but, owing to the nature of arrestment as a temporary measure, nothing corresponding to a garnishee order absolute can be made. Ships are likewise arrested and held by the sheriff. Real property is dealt with by registering a so-called cautionary hypothec or charge for the amount of money required in the order to be paid to avert temporary execution. (In this connection, it is perhaps useful to mention that all land in Germany is compulsorily registered. The hypothec will therefore be entered on the register at the competent land registry.) Personal arrest is effected by confining

the debtor in a remand prison or by restraining his liberty in such other manner as the Court may think fit (sections 930—933).

These, shortly, are the rules governing arrestment in Germany. They may be said to be typical of those prevailing in most other countries on the Continent. In France the provisions relating to arrestment may be found in the Code de Procédure Civile, Articles 557 *et seq.* They differ from those prevailing in Germany in several respects; in France one cannot seize the property of the debtor which is in his hands or under his immediate control. But one can garnishee debts owing to him. Contrary to the German system, it is not necessary to make an application to the Court in the first instance, except where the creditor does not hold a 'titre authentique ou privé.' But then almost anything will serve as a 'titre.' On the other hand, the French 'saisie-arrêt' and the German arrestment have in common that they are merely 'mesures conservatoires' to safeguard property, and that they cannot become measures of final execution until a Court has decided that they are justified.

E. C. Weiss.

THE EARLY HISTORY OF THE *FISCUS*.

THERE seems little doubt that the *Populus Romanus*, though regarded by the Roman lawyers of the Republic as the subject of rights and duties of some kind, was not conceived as an abstract entity distinct from the individual citizens. It was nothing more or less than the body of the individual citizens themselves. Since the private law of Rome—*quod ad singulorum utilitatem spectat*—was concerned with the citizen only as a private individual in his relation towards other equally independent individuals, it followed that the rights and duties of the Republic were consigned to the *ius publicum*—*quod ad statum rei Romanae spectat*.[1] This *ius publicum* was hardly law at all in the sense of the *ius privatum*, for the citizen as such had no independent standing in it. It is true that the State had for some purposes to enter into ordinary commercial dealings with its citizens—it incurred expenses in honour of public guests or for the erection of funeral monuments—but a sale when the State was a party to it became a very different thing from the corresponding transaction when both parties were private citizens. Disputes were settled by means of an administrative procedure under the control of officials, whose main concern was not to enforce a system of more or less definite rules so much as to guard the interests of the community. It was the difference between public administration and law. The State was therefore in a very real sense judge in its own cause, and the Roman Republic never laid aside its dignity in order to walk freely in the domain of private law.[2] In the same way, the conception of private property had originally no application to the possessions of the State. *Res publicae* were '*extra patrimonium*' and, though this class of things in later days was confined to *res publico usui destinatae*, it is very probable that it first it comprised all those things which were in fact owned by the State.[3] Again, the pecuniary in-

[1] (Ulp.) D. 1. 1. 2.

[2] Mommsen, Staatsrecht, ii, 556; Mayer, Deutsches Verwaltungsrecht, ii, 76.

[3] Gierke, Deutsches Genossenschaftsrecht iii, 54. In this respect the classical period was an age of transition. Professor Buckland, 'Text Book of Roman Law, 184 (n. 6), 186, tells us that though no classical text calls public slaves (*servi publici*) *res publicae* yet 'Gaius had a leaning to inclusion under the class *res nullius* of everything which had not an individual owner or owners.'

comings and outgoings of the Roman Republic, grouped together as the *Aerarium*, were distinguished from the rest of the State property and placed under the supervision of the Quaestors, but there was no approach to the notion that the *Aerarium* was a legal person having rights and duties of its own. It was no more than the common purse of the people.[4]

A great change took place with the Principate. Not only did the Emperor take over most of the responsibilities of government, but he broke with the old system of meeting public burdens out of public revenues and began to provide for the expenses of the imperial administration out of his own resources, however acquired.[5] The *imperium proconsulare* enabled him to intervene in the administration of the senatorial provinces, and it was only natural that, as the dictatorship became more avowed, the sources of income which had formerly provided the Republic with funds passed, one by one, over to the *Fiscus* or imperial treasury. Thus, although the *Aerarium* continued to exist well into the Empire and was not completely swallowed up by the *Fiscus* until the time of Diocletian, its existence had long been as shadowy as the power of the Senate.[6] The political change made possible an equally decisive revolution, though in the contrary direction, in the rules of law. If the *Princeps* had acquired the sovereign powers formerly vested in the *Populus*, he was none the less an individual human being. Through him, therefore, the way was opened to the State to enter the province of private law. As the ruler in whom the State's political might was now concentrated, he was as far from being on a level with ordinary private citizens as the *Populus* had been, but in his relations to them in the normal transactions of commercial life it was possible to treat him as a natural person, and therefore as a subject of rights and duties of private law. And something of the sort took place. The purely pecuniary side of the activities of the State—as represented by the Emperor—was to some extent severed from their political side, and with the *Fiscus* the Roman State for the first time in some measure took upon itself the obligations imposed upon private citizens by the *ius privatum*.[7] As sovereign rulers the Emperors were still '*legibus soluti*,' but through the conception of the *Fiscus* they could claim with some truth '*attamen legibus vivimus*.'[8]

[4] Mitteis, Römisches Privatrecht, i, 348.
[5] Mommsen, op. cit. ii, 998.
[6] Mitteis, op. cit. 353. The word *Aerarium* is found in the Digest (*e.g.*, 48, 10. 1. 9; 49. 14. 13; h. t. 15. 14) but is only used historically or as equivalent to *Fiscus*.
[7] Gierke, op. cit. iii, 59.
[8] Inst. ii, 17, § 8.

In course of time a distinction was drawn between that part of the imperial wealth, which was derived from public revenues and was thus especially ear-marked for administrative purposes, and the property acquired by the Emperor from private sources, more particularly before his accession. But the *patrimonium privatum*, though in theory opposed to the *Fiscus*, still remained liable to be charged with public burdens and, on the other hand, devolved on the Emperor's death intestate upon the successor to the throne and not upon his heir.[9] Thus, in order to protect the *patrimonium* from the demands of the administration, and the *Fiscus* from being eaten into by the private debts of importunate members of the imperial family, it began to be the practice for provident or public-spirited Emperors, immediately upon their accession, to transfer to their children a substantial part of the wealth of which they stood possessed.[1] Finally under Severus, a monarch who is said by Gibbon to 'have considered the Roman Empire as his own,'[2] the *Fiscus* and the *patrimonium* were assigned to distinct administrative departments and, though in the fourth century they were once more under the control of the same officials, the two funds continued to be regarded as distinct.[3]

Whether the Roman lawyers ever formulated any theory in order to provide a scientific basis for the position of the *Fiscus* in the private law is extremely doubtful; at any rate, modern writers have done their best to make up for a deficiency of which the Romans were probably not aware. The Roman jurists never avowedly departed from the position that legal personality was a matter of private law only, and that here the only possible legal person was the individual citizen It is true that the exigencies of social life had driven them to recognize that organized groups of men could properly carry on activities which were normally governed by rules of private law, but in spite of this the Roman conception of legal personality never changed; the *universitas*, such as a municipality, like the *hereditas*, was never directly described as a person. It only played the part of a person—*personae vice fungitur.*[4] No doubt, this in itself was

[9] Mommsen, op. cit. ii, 998.

[1] Antoninus Pius devoted the income of his private fortune to public purposes but reserved the capital to his family and gave it by will to his daughter. Gibbon, Decline and Fall (ed. Bury), i, 99, n. 52.

[2] Gibbon, i, 121.

[3] Whether fiscal property was grouped with public property generally as part of the *res privata Principis* or whether this last expression refers to the *patrimonium* is a vexed question.

[4] *Quia hereditas personae vice fungitur, sicuti municipium et decuria et societas.* D. 46. 1. 22. The vagueness of the conception is shown by the presence of the last word.

a great advance. Originally the *universitas* was governed solely by the *ius publicum*, to which the notion of legal personality was, in the Roman view, as foreign as it was unnecessary, and the property of the *universitas* was a *res nullius*. Later the application of the word '*publica*' to the '*bona civitatis*' was described by Ulpian as an abuse of language,[5] and the *universitates* themselves, in relation to that part of their property, which was not specifically devoted to public use, were treated as '*in loco privatorum*.'[6] But the extension of the conception of a '*persona*,' which is hinted at in the phrase '*singularis persona*,'[7] was never carried through. Even in the latest period there could be no 'person' in the private law except the natural person and no natural person but the individual human being.

Yet there were many subjects of legal rights and duties besides the isolated human being, and Savigny, adopting the terminology introduced by the Canonists many centuries after the compilation of the *Corpus Juris*, classed all these together as juristic persons or 'subjects of proprietary rights created artificially.' In the case of the *universitas* this artificial person was a pure fiction distinct from the individual *cives* or *municipes* and coming from without.[8] It followed that though some kind of material substratum was essential for the introduction of the ideal—Savigny rejects the word 'moral'—entity, its precise composition was completely irrelevant. It was taken for granted that the personality of the *Fiscus*, in some form, was as old as that of the State and as fictitious as that of the *universitas*. More recent writers, however, have pointed out that, if the *Fiscus* is one aspect of the State, it is precisely in its application to the State that the 'fiction theory,' at any rate in so far as it presupposes the 'concession theory,' completely breaks down.[9]

But the *Fiscus* had one great advantage over the *universitas*. Behind it stood not an aggregate of persons but a single human being who, though supreme ruler, was from many points of view capable of being treated like any ordinary man. The *Fiscus* might, therefore, have been regarded merely as part of the Emperor's private property, distinguished from the rest in this only, that it was destined to be applied to different ends—a distinction of fact rather than of law. According to Mommsen it is

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[5] *Bona civitatis abusive 'publica' dicta sunt: sola enim ea publica sunt, quae populi Romani sunt.* D. 50. 16. 15.

[6] H. t. 16 (Gaius).

[7] D. 4. 2. 9. 1. *Singularis persona* is opposed to '*populus vel curia vel collegium vel corpus.*' Also 50. 16. 195.

[8] System, c. 2, ss. 85, 88 (4).

[9] Michoud, La Théorie de la Personnalité Morale (2nd ed.), 21.

this idea which, however obscurely expressed, lay at the bottom of the Roman rules relating to the *Fiscus*.[1] In his view the property in the *res fiscales* must be ascribed either to the State or to the Emperor; there can be no question of any owner other than one of these. To attribute the ownership directly to the State would be to confound *Aerarium* with *Fiscus*; on the other hand, the legal ownership of the Emperor did not necessarily preclude a moral, nor originally even a legal, obligation to devote the revenue of the *Fiscus* to State purposes. Just as the contract *mutuum* passed the property but imposed an obligation to repay the loan, so the ownership of *res fiscales* passed to the Emperor and the legal obligation came to be unenforceable, and finally regarded as non-existent, only because in fact the Emperor, as ruler, could not be compelled in his lifetime to account for their due application; whilst, on his death, the whole of his property, whatever its source, passed to his royal successor —equally unaccountable—and not to his heir. Mitteis, on the other hand, whilst granting that no clear principle can be derived from the sources, finds it impossible to believe that the Emperor was ever seriously regarded as the legal subject of the rights and duties covered by the term '*Fiscus*,' in spite of such expressions as *Fiscus Caesaris* or *Fiscus privatus*. Looking at the matter from the standpoint of modern German law, he regards the *Fiscus* as an independent legal person—an *Anstaltperson*—set up by the Emperor and designed for the satisfaction of the needs of the imperial administration; its substratum being either the state department as an organized group of officials (*Anstalt* in the narrow sense) or the property itself, regarded as a fund set aside for a particular purpose (*Stiftung*) and independent both of the *res publicae ad publicum usum destinatae* and of the private property of the Emperor.[2]

To Mitteis, therefore, the '*quasi*' in the oft-cited text of Ulpian,—'*res enim fiscales quasi propriae et privatae principis sunt*'[3]—which to Mommsen represents no legal qualification of the Emperor's ownership, is merely an intimation of the vagueness of the expression of the new principle that the State as *Fiscus*, or as the subject of ordinary proprietary rights and duties, was now to be treated in much the same way as a private person. It is of course possible to take the intermediate view

[1] Op. cit. ii, 998 ff.
[2] Op. cit. i, 350.
[3] D. 43. 8. 2. 4. The text simply states that the interdict *de loco publico* does not apply to fiscal property but to '*loca quae publico usui destinata sunt*' which admittedly were never classed as part of the *Fiscus*. The *res fiscales* are no longer *extra patrimonium* but are '*in fisci patrimonio*. Also D. 18. 1. 72. 1.

that there was a historical development; originally, the property attributed to the *Fiscus* was the private property of the Emperor, but in course of time the severance of it from the *patrimonium privatum*, and its well-marked connexion with the Emperor in his public capacity, led to the attribution to it of independent legal personality. This, however, is largely a matter of conjecture.[4]

These discussions are the outcome of attempts by recent jurists to place under the Roman law of the *Fiscus* a substructure of pure theory: they are admittedly coloured by modern conceptions which would almost certainly have been strange to the Roman jurists, content as these were with practical results however vaguely expressed in terms of general principle. Moreover, the long line of mediaeval lawyers who used the notion of the *Fiscus* to find a legal basis for some restriction upon the power of rulers, never thought of the *Fiscus* as an *Anstalt* or a *Stiftung*. At any rate, the Romans through the instrumentality of the *Fiscus* had rendered the inestimable service of subordination the State, in its commercial relations, to the rules of private law. True, the subordination was never complete. The *Fiscus* was still in many respects in a privileged position and still often exempt from the ordinary legal procedure, although even this was now the procedure *extra ordinem*: and these privileges were the point around which the mediaeval discussions were to revolve. Nor did the *Fiscus* lead to any broadening of the Roman conception of legal personality: rather the State as *Fiscus* had to accommodate itself to this conception, whilst the Emperor, as far as he embodied in his person the State's all-embracing political might, still remained altogether outside of the sphere of private law. To quote the words of Gierke: 'Though perhaps the State as an organic unity was not personified, yet a kind of unified subject comparable to an individual had grown out of the State.'[5]

Whatever may be the truth as to the influence of Roman ideas upon the origin and growth of the Frankish Kingship—and no doubt Roman traditions and analogies carried great weight in those regions, such as Gaul, where the Roman provincials were the predominant element in the population—the presence of the word *Fiscus* in the Salic law and the other *Leges Barbarorum* suggests at least one point of contact. Both in the early days of the Frankish Kingdom and throughout

[4] For a concise summing up of the various views, see Buckland, Text-Book 176-7; Dernburg, Pandekten i, 96 n. 1; Koschaker, Zeitschrift der Savigny-Stiftung, Rom. Abt., 32. 407—410.

[5] Gierke, op. cit. iii, 60.

the Middle Ages the *Fiscus* is represented in legislative acts and legal documents of every kind as holding and granting out land, enjoying and asserting all manner of rights, receiving rents, dues and fines.[6] This constant usage would seem to argue for the *Fiscus* an independent legal personality. But it is clear that, whatever may have been the Roman conception, little remains of it here but the name; when payments are said to be made to the *Fiscus*, all that is meant is that they are made to the King, and the proceeds go into his private purse; when grants are made from the *Fiscus* (*de fisco*), they are gifts by the King out of his royal estates or treasury.[7]

The Frankish Kingship never completely lost all the marks of its tribal origin. The tribe was not conceived by its members as an abstract entity distinct from the individual tribesmen: it was identical with them and inconceivable apart from some gathering of them. It is only with the growth in their numbers and the consequent impracticability of assembling them all in one place that a new conception becomes possible. Ownership is bound up with actual enjoyment. There could be no clear distinction between tribal and individual ownership of land as long as the former meant that every tribesman had some power of making direct use of the land described as belonging to the tribe,[8] and whilst, again, the nearest approach to our idea of private property or to the Roman *dominium* was to be found in the homestead which, since it belonged to the individual only by reason of personal membership of the tribe or the kindred within the tribe, was neither freely alienable, divisible nor inheritable.[9] The course of events

[6] Waitz, Deutsche Verfassungsgeschichte (ed. 1847), ii, 558; Gierke, op cit., 564-5.

[7] In place of the '*fiscus* of the *Leges Barbarorum* the Anglo-Saxon codes read '*cyning*.' But expressions like '*fiscum regium*,' '*iudex fiscalis*' are to be found in the *Leges Henrici* (9, 11; 24. Liebermann, Gesetze der Angelsachsen, i, 556, 561). Aethelstan VI (*Iudicia civitatis Lundoniae*) 1. 1. gives one-third of the property of a convicted thief to the King and one-third to the '*ferscipe*' or '*societas*' (Quadrip.) of London. According to the Mercian Law, where it is the King himself who is killed, the wergild goes to his kin, and an equivalent, the cynebot or 'price of his royalty' (Kemble, Saxons in England, ii. 29), to the People (*Fam leodum*). Liebermann, 458, 463.

[8] Although the gild of later days represents a great advance in the direction of corporate personality the same conception of communal property characterizes the gilds, as indeed also the early trade unions. Webb, History of Trade Unionism, p. 75, speaks of 'a lively tradition among the aged block printers of Glasgow that, in their fathers' time, when their very active trade union exacted a fee of seven guineas from each new apprentice, this money was always straightway drunk by the men of the print field.'

[9] In the earliest stages of tribal organization the ideas of ownership which exist correspond more to our ideas of international than private ownership. As was said in a case where English judges were brought face to face with primitive conditions of landholding, the tribesmen were owners only in the sense that 'without their permission or that of their King and trustee, no traveller, still less a

which subjected the tribe to a leader—at first only temporarily for a particular foray and then permanently—and thus led to tribal kinship, made no real difference to this 'materialistic' point of view. Together with, or in place of, tribal ownership there springs up the ownership of the King or prince; but here again the King's wealth—though by conquest and by succession to Roman 'fiscal' property increased beyond all comparison with earlier tribal wealth—is held by the King not as the representative of an abstract entity, but in his natural or physical capacity. Actual participation by the tribesmen in the enjoyment of movables would naturally be more difficult than of land. Thus it happened that, with the growth of kingly power and decay of popular control, the idea of communal ownership of movables vanished, though it long continued to exist with regard to portions of the land of the tribe, or later of the nation.[1] The treasure from which the King meets public charges or rewards faithful service is regarded as his own. There is no clear distinction between his public and his private property[2]; the same rules of succession—election of a member of the kingly house—apply to his office and to his property, and are characterized by features which we should consider as derived from public and private law. And this is only the proprietary aspect of a mixture of 'capacities' which we find on every side and which continues to colour legal ideas long after tribal leadership has, through the union of several tribes under one ruler, given way to national and territorial kingship.

The word '*Fiscus*,' therefore, as used in the Middle Ages, has no specifically technical meaning. In its most general sense it covers the whole aggregate of the King's possessions, whatever their nature or source. No legal distinction is drawn between estates acquired through recent conquests and those long in the possession of the royal house; between dues received from the cultivators of the royal domains, the customary free-will offerings of native Franks or the fines paid for breach of

settler, could so much as enter without committing a trespass.' *Re Southern Rhodesia* [1919] A. C. 211, p. 234.

[1] Gierke, op. cit. ii, 359 ff.

[2] But the administration might be assigned to distinct officials and a tendency appears under the Carolingians to reserve the family estates for the purely private needs of the royal family and to free them from national burdens. But all alike were still subject to the King's power of alienation: Schröder, Deutsche Rechtsgeschichte, 127, 213. It seems that a distinction was made in England before the Conquest between the Crown domains which were inalienable by the King alone and the private estates purchased by him and therefore alienable: Kemble, Saxons in England, ii. 30. But even this distinction has its parallel in the rules relating to the land of private individuals in Glanville's day. See Pollock and Maitland, Hist. Eng. Law, i, 518.

the peace. All alike help to constitute the royal *Fiscus*, and all alike are subject to the control and disposition of the King. He differs from any other rich landowner only in the wide extent of his possessions and the variety of his sources of income. The addition of the word '*publicus*' or even '*Francorum*' as a qualification of *Fiscus* is only an expression of the fact that the King's position was after all one of national importance and that his rights, if very like private rights—as we understand the term—are, at any rate, 'intensified' private rights.[3] No doubt the possession of great wealth was a matter of the utmost moment to the King as ruler. The *Fiscus* passed to his royal successor on death or conquest; division of the realm involved division of the treasure, and females were excluded from both. But it is as true to say that his office was appurtenant to his possessions as that the latter were inseparable from his royal dignity.[4] If it was understood that his wealth should in general be applied to the public advantage, this involved no restriction in law on the regal power of disposition. There was little administration in the modern sense. The King's personal security was closely bound up with national interests and the defence of the realm; and the preservation of the King's peace, which had replaced the folk-peace, of which originally the King had been merely the protector,[5] was the main instrument for the administration of justice.

Like the manor the *Fiscus* is 'a highly complex and organized aggregate of corporeal and incorporeal things.'[6] And, indeed, the term is also used to designate specified portions of the royal possessions such as a particular manor or '*villa*' under a district official (*iudex*, *villicus*, *actor*, *exactor*, *maior*), but often comprising several parcels of land lying separate at a distance from each other. It seems, however, that except in the Romanized districts it is rare to find several '*villae*' under one and the same administration: in general, each is worked separately, though subject under the Carolingians[7] to the supervision of the royal *missi*. That portion of the royal wealth, which was of most immediate importance in times of emergency and which was constantly being replenished by the revenue from the rest of the royal possessions—the royal treasure in the specific sense of the gold, jewels and 'liquid assets' generally—was also

[3] Pollock and Maitland, i, 512; Waitz, op. cit. ii, 559.
[4] Waitz, op. cit. ii, 555.
[5] Schröder, op. cit. 125-7.
[6] Pollock and Maitland, ii, 145.
[7] Schröder, op. cit. 212.

called *Fiscus*, but here again this is but one of a large number of expressions.[8]

The use of the word in these more or less comprehensive senses is, in fact, only an example of the general tendency of early Teutonic law to attribute an independent legal existence to complex aggregates of rights without in any way ascribing to them an active subjective legal personality. Just as behind the manor stands the lord, so behind the *Fiscus* stands the King. It is no more an independent legal person than his home, court or palace, where the chest was generally kept, and indeed the terms *domus*, *curtis*, *palatium*—this last being a later importation from Italy—are used as equivalent to *fiscus*. Whilst in Rome the great wicker money-basket in which the State moneys were kept came to be a symbol for the Imperial Treasury, the mediaeval *Fiscus*, deprived of whatever independent status it had enjoyed at Rome, comes to be defined as '*sac ou bourse du roy ou l'on met publiques cens ou revenues ou fourfaitures.*'[9] Nor is the King alone in possessing a *fiscus*; the Queen, the royal princes, a monastery or private person can each have a *fiscus*, and we hear of a *fiscus* '*comitialis*.'[1]

The use of the word '*respublica*,' like that of the adjective '*publicus*,' which becomes more usual under the Carolingians, does not imply any change in the legal attitude nor any juristic distinction between royal and national property.[2] But it is at least a hint that if, on the one hand, there was, in law, no public property apart from the King's, on the other hand the King's property acquired a special character from being in fact the nation's. The King's office marked him out from other men. In cases affecting the royal rights the undefined but well-recognized pre-eminence of the Carolingian monarch ruled out any application of the ordinary modes of proof by oath with oath helpers, or by battle, and led to the assertion and vindication of special procedural privileges.[3] It seems clear from the Theodosian Code that in some cases the Roman *Fiscus* had at its disposal a more summary procedure for making good its claims than was open to the ordinary litigant. An inventory of a deceased person's estate would be taken by the fiscal officers

[8] *Aerarium*, *thesarium*, *sacellum*, *cellarium*, *camera*, *regestum* (Waitz, *loc. cit.*; Madox, Exchequer, 157); Ang. Sax. *sceattum*, *scattum* (Cn. Law of 1020. 4. Liebermann, 273); Germ. *Schatz*.

[9] See Ducange, Gloss. *sub. voc.*; Duarenus, Comment. in Consuet. Feud. c. 5, § 2; *Camera vocat locum in quo pecuniae principis reconduntur*. Madox, op. cit. 157.

[1] Waitz, op. cit. ii, 124-5; Madox, op. cit. i, 159.

[2] Waitz, op. cit. iv, 5, 6; Savigny, Geschichte des römischen Rechts im Mittelalter (2nd ed.), i, 420.

[3] Brunner, Entstehung der Schwurgerichte, 70-72, 87-89.

in cases where it appeared that the *Fiscus* was interested, and in the absence of a stronger title they were empowered to take summary possession.[4] It is therefore necessary to keep in mind that it was principally through the Theodosian Code that some glimmerings of Roman law penetrated into the darkness of the Frankish Empire. It was easy and profitable to identify the Frankish *Fiscus* with that of the Romans, and, although the exact course of events is far from clear, the Carolingian kings seem to have taken it for granted that they had stepped into the shoes of the Roman *Fiscus*. The King, unlike others, could appear by representative without any loss of status, but it was realized that this would be rather a disadvantage than a gain if an official's slip of the tongue or remissness should prejudice the royal rights. The Carolingian instructions to the royal *missi* repeatedly forbid the use of the ordinary formal procedure in cases concerning fiscal rights. An inquisition is to be held and, moreover, the judges are not to be satisfied with the testimony of any witnesses who may be produced by the parties, but are to inquire of specially credible and reputable persons, whose verdict is to be final.[5] The general hostility of the populace, which would have made the assertion of fiscal claims by the normal procedure almost impossible, ignorant as this was of any witnesses but '*testes rogati*' who could not be compelled to attend, is proved by the stringent provisions for securing the safety of those neighbours who testified in favour of the royal rights.[6]

This privilege, together with the immunity from public burdens enjoyed by the lands of the *Fiscus*, helps to account for the very extended meaning acquired by the term. For it covers not only the estates actually administered by the royal officials for the immediate benefit of the royal house (*ad opus regis*), but also estates granted out as benefices to counts or other vassals (*ad partem regis*).[7] In time it becomes the accepted view that, like our ancient demesne, land which has once belonged to the *Fiscus* never loses its privileged position, though no longer '*in vestitura*' *regis*. One writer even goes so far as to define *Fiscus* as property 'in the possession of an abbey or an individual and held under a royal grant.'[8] Church

[4] C. Th. 10. 10. 11. Cf. C. Th. 10. 28. 4, '*inquisitio palatina*.

[5] Brunner, op. cit. 88.

[6] Brunner, op. cit. 90; Schröder, op. cit. 416. It appears that the Salic law already knows of witnesses who were not called by the parties but even these could not be compelled to testify. Schröder, op. cit. 391 (n. 8).

[7] Brunner, op. cit. 72.

[8] '*Un bien de donation royale possédé par une abbaye ou un particulier*,' cited Waitz, op. cit., iv, 175.

and abbey lands are constantly referred to as part of or on the same footing as fiscal lands, but disputes concerning them could not, it seems, be the subject of an inquisition unless they were *in dominio regis*, *i.e.* had originally been granted out by the King or received back from him after a surrender for that purpose. A special concession of this privilege was, however, always possible and frequently obtained. It was precisely the absence of any clear distinction between the public and private standing of the King and between the estates possessed by him in either capacity which had opened the way for the use of this new procedure in cases in which the King had no direct interest. And when the institution reached England, by way of Normandy, it was the fact that it had never been confined to the public rights of the Crown that enabled the inquest to be placed at the disposal of the ordinary litigant and, through the instrumentality of the royal Courts set up by Henry II, to become part of the normal judicial procedure. That the privilege of the Frankish King has become the right of the ordinary Englishman is due, in no slight degree, to the fact that here, as with the Franks, it was impossible to find any legal distinction between the King as King and the King as an ordinary man.[9]

The Frankish kingship tended to keep within the same family, but it had never been forgotten that the succession was in theory elective and not hereditary: and in the absence of a direct descendant, or in the case of the minority of the next lineal heir, this principle was put into practice. When, after the break-up of the Frankish Empire and the decay of the Carolingian house, the revived imperial title was annexed to the German Kingship by Otto I in 962, the same maxim was applied to the Empire. Though the right to elect was in theory vested in all the princes, or even in the whole people, the actual electors came to be fewer and fewer until by a custom, well established in the thirteenth century and officially consecrated in the Golden Bull of Charles IV in 1356, the number of the imperial electors was fixed at seven.[1] The effect of this development was naturally to increase the power of the electors and, in the absence of a strong line of rulers, to encourage them to assert their position by making more frequent changes in the imperial dynasty. And this change in the conditions of the imperial election was reflected in an innovation which reminds us of the practice introduced by the Roman Emperors of the second century. For under the Hohenstaufen, the Emperor, on his

[9] Brunner, op. cit. 217.
[1] Schröder, op. cit. 511-528; Bryce, Holy Roman Empire, c. 14.

election, instead of merging his family estates in those coming to him as King, as had been the custom, began to resign them to his family and to support himself on those lands which devolved upon him from his successor and which thus came to be regarded in a special sense as domain lands. This was only a logical development of the Carolingian practice of reserving the family estates for family needs, but it made possible a new conception of public property.[2]

Maitland has pointed out that, though the old belief in the electoral character of the English Kingship long continued to survive, it was the absence of any clear definition of who were to be the electors, coupled with the general acceptance of the hereditary claims of the next heir, which prevented any legal distinction being recognized between Crown lands and King's lands.[3] This clearness of definition was achieved in Germany in the fourteenth century, and it is not surprising to find the customary law opposing '*des Reiches gut*,' which devolves with the imperial title, to '*des Kinniges eigen gut*,' which in default of a gift by the Emperor to the Empire—for the idea of the personality of the Empire also begins to emerge—will go to his next heir.[4] But there is still no glimmer of the idea of State property in the modern sense. The Emperor still had almost a free hand in the administration of the property acquired by him on his accession: and, indeed, during the Interregnum (1256-1273) which followed the fall of the Hohenstaufen, the two rivals for the imperial title were so lavish in their grants out of the imperial domains that these dwindled to a comparatively small area and the question lost much of its practical importance. After the thirteenth century the Emperor, instead of living on the dwindling imperial lands, used his position to augment his family estates[5]; and though, as time went on, it came to be established that the assent of the Diet was necessary for the alienation of the domain lands, this did not signify any grasp of the conception of State ownership as distinct from private ownership, but only an increase in the number of voices necessary for alienation.[6]

For the evolution of a more developed doctrine of State property a favourable combination of legal theory and political circumstances was necessary. The theory, in this as in other cases, was to come from across the Alps and resulted from a

[2] Schröder, op. cit. 578-9.
[3] Op. cit. i, 526.
[4] Schwabenspiegel, Landrecht, c. 124 (ed. Lassberg).
[5] Lodge, Close of the Middle Ages, 6.
[6] Gierke, op. cit., ii, 569 ff.

new application of the Roman texts relating to the *Fiscus*. The facts to which the theory could be applied came into existence with the growing independence of the mediaeval town. By the time that the new legal ideas had made their way, the Holy Roman Empire had ceased to be an effective force and, like the German nation to which it was inseparably annexed, had degenerated into little more than a loose confederation of principalities and cities united by a merely nominal allegiance to an impotent figurehead. Yet to the early expounders of the revived Roman texts this Empire was the successor of Imperial Rome and, as such, the only political entity to which their learning could be applied. The problem was solved by the gradual transfer of the doctrine of the *Fiscus* from the moribund Empire to the active corporate life of the towns, and from these again to the German territorial States which were springing up on all sides. The idea of State personality in Germany worked its way upwards from the town to the State; the legal theory of State property was, in no small degree, the result of the penetration downward from the Empire of the resuscitated conception of the *Fiscus*.

It has more than once been pointed out that the mediaeval town was the melting-pot in which the old ideas of law and politics were fused before assuming their modern shape.[7] In the first place, we find the beginning of a separation of the political and legal personality of the community from that of its members. This was the result of the growth of an organized system of self-government devised for the purpose of realizing the common interest and with funds at its disposal which were destined to this end. The conception of a corporate revenue 'which is not going to be divided up among the townsfolk'[8]—an idea unknown to the Glossators or to Bracton, their disciple—is worked out, and with it the notion of public, as distinct from joint—but private—property, gains acceptance. In the second place, the confusion of *imperium* and *dominium*, which is so characteristic of the feudal age, gives way to a distinction between political power and property (whether public or private), and between public and private law. The Roman doctrine of the *Fiscus*,—based, as it probably was, upon this distinction,—therefore naturally found in the mediaeval town its most convenient point of practical application.

But the working out of these developments could not be other than slow. The well-known passage in which the Roman philosopher attributed *potestas* to the ruler and *proprietas* to

[7] *E.g.*, Gierke, op. cit., i, 300.

[8] Pollock and Maitland, i, 656.

the subject, contained a counsel of perfection for a society dominated by feudal conceptions[3]; and it was cited both by those who opposed usurpations of royal rights by powerful vassals,[1] and also by those who protested against royal encroachments upon private property.[2] But the fact that *imperium* was a marketable commodity was turned by the towns to their own advantage. Dr. Coulton remarks that 'when French villages, in the twelfth and thirteenth centuries, worked their way up to some real form of self-government, the first and most important step was to buy off, by enormous sacrifices of money, all interference from a lord who was frequently an ecclesiastic.'[3] And in this they were only following the example of the great cities of Germany and Lombardy. In any case the powers which the town was often forced to buy for hard cash underwent a subtle transformation after they had passed from the feudal lord. When once acquired they became—in so far as they had been directed against the citizens of the town—an integral part of the town's political power and were regarded as 'an inalienable attribute of a territorial community.'[4] The acquired right becomes a natural right. It was also in the maintenance of its franchises that the 'ideal will' of the English borough chiefly manifested itself.[5]

Outside the town the severance of *imperium* from *dominium* was not so completely carried through. It is very probable that the modern idea of sovereignty as a sort of right vested in a sovereign person or body of persons would never have arisen but for the treatment of *imperium* as a kind of *dominium*.[6] But, at any rate in Germany, the distinction was eventually accepted by most of the jurists as the logical result of the natural law theory of social contract in its later form; and it is in Germany therefore that the theory of the *Fiscus* has exercised most influence. In France, it is true, one of the legacies of the *Ancien Régime* to the Republic is the separation of the *domaine*

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[3] '*Ad reges enim potestas omnium pertinet, ad singulos proprietas. . . . Sub optimo rege omnia rex imperio possidet, singuli dominio.*' Seneca, De Beneficiis, vii, cc. 4, 5. Another passage: '*Caesar omnia habet, fiscus eius privata tantum ac sua, et universa in imperio eius sunt, in patrimonio propria,*' *ibid.* c. 6, used by Mommsen to support his view of the *Fiscus*, is said by him to contain the first use of the word in its later sense in Roman Law. The word is obviously used loosely.

[1] Loyseau, Traité des Seigneuries, 4.

[2] It is used as a motto by Turnor, The Case of the Bankers (3rd ed. 1675); Bodin, Les Six Livres de la République (ed. 1580), 157.

[3] The Mediaeval Village, 298 (n. 1).

[4] Gierke, op. cit. ii, 673; also 716—718.

[5] Pollock and Maitland, i, 686.

[6] Duguit, Les Transformations du Droit Public, 2-10; Bodin (op. cit. 125) describes the sovereign as '*propriétaire et saisi de la souveraineté.*'

public,' consisting of those portions of French territory which are not '*susceptibles d'une propriété privée,*' from the '*domaine de l'Etat,*' which is enjoyed by the State '*comme tout particulier.*' The latter is alienable, the former not. But this distinction, though enshrined in the Civil Code,[7] has not been logically carried out—indeed, it may be impossible to do so—and the relatively less important part played in France by the doctrine of the *Fiscus*, in spite of the early development there of the idea of State personality and State ownership, has been ascribed to this fact.[8] In England the legal weapons used in the struggle for political liberty have not included much abstract theory. The English kingship has, in Maitland's phrase, continued to be a '*mode of dominium,*'[9] but owing to the growth of parliamentary power and constitutional usage it has long ceased in any serious sense to partake of the nature of *imperium*. But in spite of this the property of the State is still in law that of the King, and it has needed more than one statute to prevent the converse from being still true.[10]

J. Walter Jones.

[7] Arts. 537-541; Bodin, op. cit. 857-860; Esmein, Histoire du Droit Français, 324-9.
[8] Hatschek, Die Rechtliche Stellung des Fiskus, 36-41.
[9] Pollock and Maitland, i, 513.
[10] Pollock and Maitland, i, 518; Maitland, Collected Papers, iii, 243 *et seq*

THE GROWTH AND SCOPE OF EXTRA-TERRITORIALITY IN CHINA.

III.—*The Nature of Extraterritoriality from the Standpoint of Jurisprudence.*

'THE extraterritorial rights of the Powers in China,' wrote a recent commentator, 'rest upon no principle of international law, but constitute exceptions to the general principle of sovereign jurisdiction.'[1] It is rather difficult to discover what the learned author meant by the first part of this observation. If by the phrase 'rest upon no principle of international law' it is implied that the imposition of extraterritoriality in China is in any way not in conformity with international law, the observation is incorrect for two reasons. In the first place, it has already been observed that extraterritoriality is imposed upon any community not 'so far possessed of civilization that its territorial jurisdiction can be recognized'; and, secondly, extraterritorial jurisdiction is exercised at the present time in China in virtue of treaty stipulations. Lest it should be thought that the rule of international law with respect to 'jurisdiction that can be recognized' is one which has been resorted to for the purpose of defending a claim against China otherwise unjustifiable, it may be noticed that the test has been applied in modern times by the Powers to Japan, Korea, Siam, Turkey, Morocco, Tripoli, Muscat, Egypt, the Congo Free State, Madagascar and Persia. In Japan and Siam extraterritorial rights were voluntarily resigned as soon as the native jurisdiction in those countries could be recognized.

The conception that law is territorial and not personal is essentially a modern one, and it would be incorrect to say that it gained general acceptance, even in Europe, before the French Revolution.[2] The relinquishment of the older idea is due

[1] Quigley, Extraterritoriality in China, A. J. I. L., January, 1926, p. 48.

[2] In England, the movement towards the centralization of justice dates from early Plantagenet times, and more especially from the reign of Henry II. It is interesting to notice, however, that the right of an alien (until 6 Geo. 4, c. 50, s. 47, it extended both to civil and criminal cases) to challenge a jury on the ground that one half of them were not aliens (*i.e.* that it was not a jury *de medietate linguae*) was not finally abolished until the Naturalization Act, 1870 (33 & 34 Vict. c. 14, s. 5). The obstacles to a general acceptance of the

primarily to the spread of theories of absolute territorial sovereignty from the Renaissance onwards. The ancient world looked at the question of jurisdiction from precisely the opposite point of view from that of the present day. A community attempted to exclude as many people as possible—and especially foreigners—from the benefits of its system of law. This is excellently illustrated from the early history of Roman law, and particularly the early history of the *Ius Gentium*. Extra-territoriality is much older than the Romans, however. Both the Phoenicians and the Greeks, when they formed mercantile communities in foreign ports, established *proxenoi*. The powers and duties of these officials corresponded almost exactly to those of a modern European Consul in China. They protected their countrymen in their dealings with the natives, and they either tried offenders directly, or else were present at their trial in the capacity of assessors. In some countries, and particularly in Greece, a foreigner could not be tried by the law of the land, and he was accordingly tried by his own laws. This system of foreign Consuls was afterwards adopted by both the Greeks and the Romans.[3]

territorial, in place of the personal, theory of jurisdiction, on the eve of the French Revolution, were (1) the survival of the separate jurisdiction of the Church; (2) the survival of the feudal Courts on the Continent of Europe. The territorial theory, however, had been making headway since the Renaissance, and it had already succeeded in abolishing the separate consular jurisdictions in European States. On this point, Tarring has the following interesting paragraph: 'By the middle of the seventeenth century, with the adoption of the system of permanent diplomatic representatives among European nations, and the progress of the notion of State-sovereignty within State territory, the exercise of coercive judicial functions by foreign Consuls was found to be incongruous and inconsistent with national rights; while the growth and fair enforcement of municipal law, as well as the general softening of international manners, rendered it less necessary. In consequence, throughout Christian Europe this jurisdiction was surrendered into the hands of the territorial authorities; and the mediaeval jurisdiction of the Consul shrank into a superintendence over the shipping and commercial interests of the nation he represented, and a loosely defined authority or general consultative position towards his fellow-countrymen within his district' (British Consular Jurisdiction in the East, 1887, p. 4). To this last statement there are a few exceptions—*e.g.* by the treaty between Spain and Turkey in 1782, reciprocal extraterritoriality was granted, and there are other instances. (See a later footnote.) Moreover, a recent writer has described the condition of Egypt at the date of the establishment of the Mixed Courts as follows: 'There were at the end of 1875 fourteen different foreign Courts meting out justice on Egyptian soil. There were also thirteen non-Muhammadan Ottoman Communities which had judicial systems in working order. In addition to this, the *Makham Sharia* was the ordinary common law Court; and various Muhammadan tribunals completed this judicial network. In a word, the Turkish emblem flew, over a land, and not over a people. Law was personal, and not territorial. (Pièrre Crabitès, the Fiftieth Anniversary of the Mixed Tribunals of Egypt, 'The Nineteenth Century,' March, 1926, pp. 366-367.)

[3] 'Proxenia is in many respects the prototype of our modern consular system. In modern Greek the word πρόξενος is used as the equivalent of the word "consul"': Coleman Phillipson, International Law and Custom of Ancient Greece and Rome, vol. i, p. 149.

In the Middle Ages there was no extraterritoriality, because there was no territoriality. The Court of a sovereign of a state was merely a Court for his tenants-in-chief. Each of those tenants had Courts, and so on downwards. Moreover, the whole of the clergy were subject to the separate jurisdiction of the Church. The first hint of the modern problem of extraterritoriality may be traced in such struggles as that of Henry II and the Church over the jurisdiction issue. Even the merchants had their separate Courts, and as far as foreign merchants in a state were concerned, Hall observes: 'In early times a Consul in a European port habitually exercised quasi-judicial functions as between the merchants of his own country; he, at least in some places, composed differences between his own people and the local traders, and caused satisfaction to be made in cases of injury and even of violence done to the latter. Sometimes the powers with which Consuls were invested appear to have been assumed independently of the territorial sovereignty. The letters patent given to Lorenzo Strozzi by Richard III in 1485 seem to rest rather upon general usage of nations than upon any antecedent grant of privileges from Pisa, where the consulate was established; they moreover contain a direct creation of a royal magistracy, and put under it not merchants only, but all subjects of the Crown in those parts.'[4]

A commercial treaty concluded between Genoa and Tunis in 1250 provides for reciprocal extraterritoriality, and it would seem that during the period from the end of the thirteenth to the beginning of the fifteenth centuries consular jurisdiction became firmly established in practically every important commercial town in Western Europe.[5] Of this period Mr. W. A. Bewes writes: 'It will be evident that there arose in the Middle Ages several classes of Consul. First, there was the

[4] Foreign Jurisdiction of the British Crown, 1894, pp. 132-133. The actual appointment runs: 'Whereas certain merchants and others from England intend to frequent foreign parts, and chiefly Italy, with their ships and merchandise, and we being desirous to consult their peace and advantage as much as possible, and observing from the practice of other nations the necessity of their having a peculiar magistrate amongst them for the determining of all disputes etc. between merchants and others, natives of England. Moreover, we understanding that the City of Pisa is a very proper place for the residence of our merchants; and being assured of the fidelity and probity of Laurentio Strozzi, a merchant of Florence, have and do, at the request of our merchants already frequenting Pisa, and such as are to resort thither, appoint him to be consul and President of all our merchants at Pisa and the parts adjacent, allowing him for his trouble herein the fourth part of one per cent. on all goods either imported to or exported from thence': Rymer, Foedera, vol. xii, p. 261. Christopher Spence was appointed to the same office in the following year: Anderson, Origin of Commerce, vol. i, pp. 301, 303.

[5] A number of examples are given in Bewes' The Romance of the Law Merchant, Chap. VIII, 'The Consuls, Consulados, and Fair Courts,' pp. 80-87.

itinerant Consul or Consuls who travelled with their compatriot traders, watched over their interests and judged their differences . . . . and, secondly, there was the permanent consulado or consulate, having similar but greater powers in the cities of their own country, where they and their prior formed the commercial Court; thirdly, the consulate which was organized as a fixed institution in foreign trading cities with administrative and judicial jurisdiction over their nationals who were predominantly traders. This last class survives in certain states of imperfect civilization. Fourthly, there were the more permanent Courts in the towns visited by the itinerant merchants in which the word "Consuls" was usually applied to the judges of the merchants, and which Courts or, what was more usual, the municipal Court of the prior and Consuls, subsequently developed into standing commercial Courts, greatly extended in France by Charles IX, and the forerunners of the present commercial Courts. The same judges were called *échevins* in Provence and Languedoc. Whether the personnel was elective, as was usual, or not, these Courts being prerogative Courts, their head, or *conservateur*, was at first appointed by the lord or municipality having the right to the Court. In Spain and Toulouse and some other places the president was called prior, while in other places the more ancient term of *prévôt* was continued.' [6]

From the foregoing sketch of the history of consular jurisdiction two things are evident. In the first place the history of that jurisdiction is unbroken from Phoenician times to the present day, when its operation is confined chiefly to China; and in the second place consular jurisdiction is always associated with the progress of commerce. In protecting their nationals in a country where commercial law was non-existent, the Powers in their policy towards China in the nineteeth century were doing no more than follow the same impulse which has guided commercial states from ancient times. In England the separate jurisdiction of the mercantile Courts only ceased when the King's Courts enforced the law merchant, as incorporated by judicial decisions from the beginning of the seventeenth to the end of the eighteenth century. It is impossible to imagine the abolition of the commerical Courts until the extending jurisdiction of the King's Courts had rendered their further existence unnecessary. The same test has since been applied to those countries where extraterritorial rights were formerly exercised.

[6] Op. cit. p. 85. See also American Consular Jurisdiction in the Orient: F. E. Hinckley, Chap. I.

In modern times reciprocal extraterritorial rights have not infrequently been conceded by treaties between states. Thus, in 1875, Turkey and Persia concluded a treaty in which full extraterritoriality was freely given to the subjects of each Power. The Treaty of Nerchinsk between Russia and China in 1689 made similar arrangements for Russian and Chinese subjects, and these arrangements were confirmed by later treaties between the two states, concluded in 1727, 1768, and 1851.[7] Later still mutual extraterritorial rights were conceded to the signatory Powers by the Treaty of Commerce and Navigation between China and Japan in 1872, from which it follows, not that China resented extraterritoriality as an impairment of her sovereignty (otherwise these arrangements for mutual extraterritoriality would have been equally repugnant to her), but that unilateral extraterritoriality was resented by China as a blow to that sense of superiority which was commented upon by all early travellers to China, or, at least, as an implication of inferiority from the legal point of view.[8]

The theory that extraterritorial rights are a limitation of sovereignty is an entirely modern conception due to a change in the conception of sovereignty itself. At the present time its essential characteristic is absolute authority within defined territory. Previously its essential characteristic was personal allegiance between an individual and his overlord. In Oriental states, as Dr. Hinckley points out, the notion of personal allegiance survived even longer than in the West. 'It was usually by rendering military service, or by the payment of tribute, that various divisions of the Oriental nation recognized the sovereignty of the central Power, and the territorial borders of an Oriental state extended as widely as its rulers could compel the giving of tribute or of military service. In this way the rulers in the Levant thought of the European traders as sufficiently acknowledging their sovereignty when they paid their taxes at the seaport. So also in China and Japan the Europeans, when they had paid taxes on their trade, were regarded as having given satisfactory recognition of the sovereigns of those countries. In the early years of Western intercourse with countries of the Far East there was less pride on the part of

[7] Russia obtained extraterritorial rights in China on the same basis as the Western Powers in 1858.

[8] Other treaties in which reciprocal grants of extraterritorial rights have been made are: the treaty between Spain and Turkey, 1782 (confirmed 1840); the treaty between Spain and Tripoli, 1784; the treaty between Great Britain and Turkey, 1809 (the extraterritorial rights of Turkish subjects are in respect of Malta only, 'yet whether a Turkish consul in Malta ever exercised extra-territorial jurisdiction there is no evidence': Hinckley, op. cit. p. 18).

Oriental sovereigns in preserving their territorial jurisdiction. China, indeed, appears to have desired to retain territorial jurisdiction; Japan to have yielded for the sake of convenience and to avoid entanglement with foreign Powers. There existed in Turkey before the middle of the nineteenth century no thought of extraterritoriality as a disparagement to the sovereignty of the Sultans.' [9]

In his preliminary discussion of the nature of the foreign jurisdiction of a state,[1] Hall observes that from the modern conception of territorial sovereignty proceeds a fundamental right and a correlative fundamental duty of a state. The right of a sovereign over his subjects implies the correlative duty of protecting them when abroad. This duty limits the excessive application by a sovereign of its absolute rights over those within the territory of a state. The duty of protection now operates among Western nations in two ways only. It allows a state to exact reparation from another when its subjects have been oppressed, or when they have suffered injury otherwise than by process of law; and, secondly, it provides a method of protecting them against laws which are unreasonable or 'totally out of harmony with the nature and degree of civilization by which a foreign Power affects to be characterized,' and, moreover, against an unreasonably bad administration of the laws of a state. Where a state acts in pursuance of its duty of protecting its subjects abroad, it does so either through the medium of diplomatic remonstrance or by more direct and forcible measures. The duty of protection residing in a state as regards its subjects corresponds to a right to protect residing in the state as regards other states, and 'in Oriental and semi-civilized countries, where the necessity of allowing the right to operate is frankly acknowledged, it gives rise to arrangements under which a state voluntarily makes a permanent surrender of some portion of its jurisdiction for the purpose of securing to the subjects of another country the means of regulating their life in conformity with their own laws and customs. A compromise, varying with the circumstances, is arrived at between the sovereign rights of the state and the jurisdictional needs of a foreign civilized power.' [2]

Surveying the attitude of European nations towards extra-territorial rights as a whole, and more especially the pronouncements of Great Britain in 1902, and of the United States and Japan in 1903, that extraterritorial rights in China would

[9] Op. cit. pp. 17—18.
[1] Foreign Jurisdiction of the British Crown, 1894, p. 4.
[2] *Ibid.* p. 5.

be abandoned as soon as the condition of Chinese Law and its administration warranted it, together with the practice of the Powers in relation to Japan in 1899 (a circumstance which induced Oppenheim to cite Japan as 'an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in such states as soon as they have reached a certain level of civilization'[3]), the inference is irresistible that extraterritoriality is at the present time a temporary privilege, which, as a derogation from the full sovereignty of the state upon which it is imposed, is surrendered as soon as the imperfections in the law and legal administration of the state, in virtue of which it was first imposed, are removed.

IV.—*The Movement towards the Abolition of Extraterritoriality and the Present State of Chinese Law.*

The movement towards the abolition of extraterritoriality may be said to have begun with the treaty of September 5, 1902, between Great Britain and China. Article XII of this treaty declares: 'China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant her so doing.'[4] The date is significant. One year after the Boxer Rebellion Great Britain was prepared to acknowledge China's honest efforts at national reorganization. The United States made a similar promise by Article XV of the treaty of October 8, 1903,[5] and Japan likewise agreed on the same day to do the same.[6] In the treaty between Sweden and China, signed July 2, 1908, occurs the following: 'However, as China is now engaged in reforming her judicial system it is hereby agreed that as soon as all other Treaty Powers have agreed to relinquish their extraterritorial privileges, Sweden will also be prepared to do so' (Article X).[7]

At this period it seemed not improbable that the reform movement in China would accomplish in China something of what had just been completed in Japan, viz. the complete

[3] International Law, 3rd edition, vol. i, p. 606.
[4] McMurray, Treaties and Agreements with and concerning China, vol. i, p. 351.
[5] *Ibid.* p. 431.
[6] *Ibid.* p. 414.
[7] *Ibid.* p. 745.

reconstruction of the political and legal system. Perhaps this in some measure accounts for the invitation to China to participate in the second Hague Peace Conference, concerning which it has been authoritatively stated that 'the mere fact that the Chinese Government was invited to send representatives to such an assemblage may be taken as an acknowledgment of its international status' [8] at the date.

On August 14, 1917, President Feng Kuo-cheng, in a proclamation, formally declared war on Germany and Austria-Hungary. It is impossible to analyse here all the political reasons for this step, but it is essential to notice that the Chinese Government hoped to secure a discussion of extraterritoriality, along with other questions affecting China, at the Peace Conference. The declaration of war included a denunciation of 'all treaties, agreements, conventions' concluded between the Central Powers and China. China ultimately made peace separately with Germany and Austria-Hungary, and by the Sino-German Agreement of May 20, 1921, Germany agreed to the renunciation of her extraterritorial rights in China. Article 234 of the Treaty of Saint-German implies that Austrian extraterritorial rights in China no longer exist. With regard to Russia, a Presidential Mandate of September 23, 1920, suspended all Russian extraterritorial rights. After the formal recognition of the Union of Soviet Republics by China an agreement between the two Powers was signed on May 31, 1924, expressly abolishing Russian extraterritorial rights in China.

To balance these circumstances, however, it must be remembered that China conceded extraterritorial rights to Switzerland in 1918.[9] Moreover, the Japanese re-opened the question, as far as their own subjects were concerned, in the 'Twenty-one Demands' to China in 1915. In the original version of these demands, presented on January 18, 1915, Japan made the following claim:—'Inasmuch as the Japanese Government and the Chinese Government have had many cases of dispute between Japanese and Chinese police to settle, cases which aroused no little misunderstanding, it is for this reason necessary that the police departments of important places (in China) shall be jointly administered by Japanese and Chinese, or that the police departments of these places shall employ numerous Japanese, so that they may at the same time help to plan for the improvement

[8] Hall, International Law, 7th edition, p. 42.

[9] On the other hand, the new nations created by the Peace Treaties have received no extraterritorial privileges in China.

of the Chinese Police Service.' [1] This claim was modified in the revised demand of April 26, 1915, as follows:—Group II, Article 2: 'Japanese subjects in South Manchuria may lease or purchase the necessary land for erecting suitable buildings for trade and manufacture or for prosecuting agricultural enterprises.'

Article 3: 'Japanese subjects shall be free to reside and travel in South Manchuria and to engage in business and manufacture of any kind whatsoever.'

Article 3a: 'The Japanese subjects referred to in the preceding two articles, besides being required to register with the local authorities passports which they must procure under the existing regulation, shall also submit to police laws and ordinances and tax regulations, which are approved by the Japanese Consul. Civil and criminal cases in which the defendants are Japanese shall be tried and adjudicated by the Japanese Consul; those in which the defendants are Chinese shall be tried and adjudicated by Chinese authorities. In either case an officer can be deputed to the Court to attend the proceedings. But mixed civil cases between Chinese and Japanese relating to land shall be tried and adjudicated by delegates of both nations conjointly in accordance with Chinese law and local usage—when the judicial system in the said region is completely reformed, all civil and criminal cases concerning Japanese subjects shall be tried entirely by Chinese law Courts.' [2]

The revised claim was certainly more in accordance with the Japanese declaration of 1903 than the first demand. At first sight it practically gives Japan the same rights in China as the Chefoo Convention had given to Great Britain. In reality it goes further. The Japanese subject need only submit to those police laws and ordinances and tax regulations as are approved by the Japanese Consul. Moreover, it establishes a special 'mixed' Court for land cases. China had at first suggested that Chinese authorities should have full jurisdiction over Japanese settlers in South Manchuria. This proposal was rejected, as was also a later one that cases relating to land should be adjudicated by the Chinese Courts. On May 7 the Japanese Government despatched an ultimatum to China, and this was accepted the following day. The resulting treaty was signed on May 25, and ratifications exchanged on June 8.

At the Peace Conference in 1919 China presented a reasoned claim for readjustment of certain questions, one of them

[1] Group V, Article 3. McMurray, Treaties, vol. ii, p. 1233.
[2] McMurray, Treaties, etc. vol ii, p. 1220.

being the question of extraterritoriality. After recalling the declarations of Great Britain in 1902, and of the United States in 1903, it proceeds to examine whether Chinese law and its administration have progressed sufficiently to warrant the relinquishment of extraterritorial rights. It declares 'while we do not claim that the Chinese laws and their administration have now reached such a state as has been attained by the most advanced nations, we do feel confident to assert that China has made very considerable progress in the administration of justice and in all matters pertaining thereto since the signing of the above mentioned Commercial Treaties.' As evidence of this the delegates put forward the following circumstances:—

1. China has adopted a modern Constitution, separating the judiciary from the executive and the legislature, and guaranteeing to the citizens the fundamental rights of life and property.

2. China has prepared five Codes—the Criminal, Civil and Commercial Codes, and the Codes of Civil and Criminal Procedure. Of these, the Provisional Criminal Code and a portion of the Law of Procedure are provisionally in force. Some of the others are 'duly promulgated.'

3. Three new grades of Courts—District Courts, High Courts and the Supreme Court in Peking—have been established, together with a system of procuratores.

4. Legal procedure has been improved. Civil and criminal law has been separated; trials are public, and corporal punishment to enforce confession is abolished. Properly qualified counsel practise in the Courts.

5. The judicial officers receive regular legal training.

6. The prison and police systems have been reformed.

The next portion of the memorandum recites certain defects of extraterritorial jurisdiction in China. These are:—

1. That there is a great diversity of the laws to be applied. Different decisions may be given on the same facts by the Consular Courts of different nationalities.

2. There is no effective control of witnesses or plaintiffs of another nationality. Neither can be punished for perjury nor committed for contempt of Court. Moreover, the Court cannot enter a counter-claim against a plaintiff of another nationality.

3. The difficulty of obtaining evidence when a foreigner commits a crime in the interior. He must be tried by the nearest Consuls, who may be thousands of miles away, and to whom all evidence must be transmitted.

4. The consular and judicial functions of any particular Consul conflict.

The Chinese delegation therefore asked for a complete abolition of extraterritoriality on the following conditions:—

1. The promulgation of the prepared Codes.
2. The establishment of new Courts in all the districts where foreigners reside.

These conditions China undertook to fulfil by the end of 1924. The delegation, however, also asked for certain immediate modifications:—

(a) That every mixed case, civil or criminal, where the defendant or accused was a Chinese, should be tried and adjudicated by Chinese Courts without the attendance or interference of any representative of a foreign Power.

(b) That warrants issued or judgments delivered by Chinese Courts might be executed within the concessions, or any building belonging to a foreigner, without preliminary examination by any foreign Consul or judicial officer.

To these requests the Powers represented at Paris found it impossible to accede, and China accordingly found herself unable to sign the Treaty of Versailles. The question of extraterritoriality, however, was not forgotten. It was postponed until a further opportunity for discussion presented itself. This opportunity occurred at the Washington Conference in 1922. At this Conference the assembled Powers, after recalling the promises made by Great Britain, the United States and Japan in 1902 and 1903, agreed to the following resolution:—

'That the Governments of the Powers above named shall establish a Commission (to which each of such Governments shall appoint one member) to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the Government of the several Powers above named their findings of fact in regard to these matters, and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise. their respective rights of extraterritoriality.'

The Powers are left free to accept all or any portion of the recommendations of the Commission, and by an additional resolution, non-signatory Powers having extraterritorial rights in China were permitted to accede to the resolution. The

Chinese delegates submitted a separate resolution, which read as follows:—

'That China, having taken note of the resolutions affecting the establishment of a Commission to investigate and report upon extraterritoriality and the administration of justice in China, expresses its satisfaction with the sympathetic disposition of the Powers hereinbefore named in regard to the aspiration of the Chinese Government to secure the abolition of extraterritoriality in China, and declares its intention to appoint a representative who shall have the right to sit as a member of the said Commission, it being understood that China shall be deemed free to accept or to reject any or all of the recommendations of the Commission. Furthermore, China is prepared to co-operate in the work of this Commission and to afford to it every possible facility for the successful accomplishment of its tasks.'

The position since the Washington Conference may therefore be best defined by observing that the Powers will only retain their extraterritorial rights in China so long as no complete modern Chinese Code is enforced throughout the country, and so long as existing disorders make it impossible for the Chinese Government to function properly. Meanwhile the Powers will co-operate in every possible way with China to attain these ends.

There was unfortunately considerable delay before the ratifications of the Washington treaties were complete, with the result that the Commission was only assembled in 1925. During the summer of that year anti-foreign riots in the coast ports and in Peking demonstrated the impatience of certain sections of the Chinese to see the extraterritoriality treaties revised. The Note which the Powers presented to China as a result of these incidents reiterated the sympathy of the Powers towards China's difficulties, maintained the conclusions reached at the Washington Conference, and pointed out that it was greatly to be regretted that the Chinese Government during the past few years had been unable to establish its authority. Nevertheless, it recommended that the Commission should begin its work at an early date, and concluded by observing that the Commission's report 'will serve as a basis for the recommendations to be made in pursuance of the resolution for the purpose of enabling the Governments concerned to consider what, if any, steps may be taken with a view to the relinquishment of extraterritorial rights.'

It is exceedingly difficult to obtain a true estimate of the present state of Chinese law. The Chinese official attitude, as is not altogether surprising, is exceedingly optimistic. The

foreign Press in China is, as a rule, critical, and in its reports of its administration, which appear from time to time, distinctly pessimistic. The foreign lawyer in China has rarely any knowledge of the administration of Chinese law outside the treaty ports, whilst foreign observers, enthusiastic in the cause of China's emancipation, are often misled by Chinese 'official reports' (which are not infrequently anonymous) and far-reaching claims, which are often little more than clever propaganda. The late Professor Parker, writing in 1917, observes at the end of a chapter dealing with the development of Chinese law: 'Things are in such a state of flux under the Republic that it is hardly safe to say what law is actually followed by Chinese judges; what is the juridical capacity of those judges; and what is the *ratio decidendi*. So far as I can judge, whatever the law and the judge may theoretically be, justice to the average claimant is as far off as in past times, and the Chinese Courts are as unfitted to replace the extraterritorial consular Courts as ever they were.' [3]

The process of law reform in China began soon after the opening of the present century. A Commission was appointed to prepare a number of draft codes—civil, criminal and commercial. With the Commission were associated Japanese experts, with the result that the primary influence upon the codes so prepared was Japanese. Thus, indirectly, German juristic conceptions have been imported into China. The revolution occurred, however, before these codes were promulgated, but in March, 1912, the Republican Government directed that the draft criminal code should be applied on all criminal cases, at the same time providing that a revised edition of it should be prepared. The first revision was completed in 1914, but a second and more thorough revision was undertaken soon afterwards. The Commission was strengthened by the addition of such well-known jurists as Dr. C. H. Wang, Mr. Tung K'ang, Mr. Lo Wen-Kan, and M. Padoux, formerly legal adviser to the Siamese Government. The second revision of the criminal code was published in 1919, and since that date codes of criminal procedure, civil procedure, commercial law, and a trade marks law have now been published. It is incontestable that these laws represent a fusion of the best of the Chinese law with modern Western juristic conceptions. They form another link in the ever-lengthening chain of legal systems derived ultimately from the Roman.

[3] China (2nd edition, 1917) p. 342.

The Chinese judiciary has also been undergoing systematic reorganization since 1907, and, moreover, special courses of legal training have been established at the Peking Law School and elsewhere.[4] Prison reform has also been undertaken, and in 1906 a special prison department was created within the Ministry of Justice.

The present position with regard to Chinese law is, therefore, that there exist a number of codes, designed to meet Western requirements, one of which (the criminal code) is nominally in force, while the others have not yet been promulgated. On the other hand, the Republican Government has passed laws from time to time, and theoretically these are in force throughout the country. In actual fact they are often completely ignored. Thus, in February, 1925, it became necessary for the Municipality of Shanghai to take action with regard to the propagation of Bolshevik doctrines from Communist educational institutions within the Settlement. In these cases, however, there were serious legal difficulties. Thus, Kotenev observes: 'The free publication and circulation of seditious literature in Chinese territory was also proved in a number of actions, which were heard by the Court during the year under review. The handling of such cases was very seriously hampered by the absence in China of a recognized law regulating the Press. The Chinese Law of Publication, promulgated on December 4, 1914, by the late President Yuan Shih-kai, while still in force, has, in fact, fallen into disuse. Of course the application of it could not be disputed from a legal point of view, but the fact that it is not applied by many of the Chinese Courts has shaken its authority in view of the questionable competence of the last acts of President Yuan Shih-kai. However, the Court decided to resort to it as the only legal remedy which dealt directly with offences by the Press.'[5] This law was finally repealed on January 29, 1926. Elsewhere, discussing a case involving the liability of shareholders and partners in a Chinese unregistered company—a case which came before the Mixed Court in 1925—the same author observes: 'It was one of those questions which compelled the local merchant bodies to protest against the promulgation of the law, on account of its conflict with China's customs'—a clear indication that the new code does not meet all the requirements,

[4] On the general topic of China's reforms, see Tyau, China Awakened, chap. xiv

[5] The Mixed Court in 1925, in 'The North China Trade Review': Shanghai, March 17, 1926, p. 32.

even of Chinese merchants. It can scarcely be argued, therefore, that it ought to be extended to foreigners without amendment.

The Chinese Government has been sincere in its efforts to reform the system of judicial administration in China, but its authority is comparable with that of the early French kings—it does not extend very far beyond the capital. Had it been otherwise, extraterritoriality would now have been well on its way towards abolition. A Presidential Mandate of December 28, 1914, advocates, as improvements of the existing state of affairs, the stringent examination of law officers, a check upon their work, control of the practitioners of law, abstention from appointing magistrates to their native towns (*i.e.* to guard against partiality), the appointment of prefects as judges where necessary, and judicial reform. Soldiers, officers of higher rank and others interfering with the course of justice render themselves liable to severe punishment.[6]

A later mandate of January 10, 1915, threatens them with heavy penalties if they join political parties.[7] A mandate of April 28, 1919, gets to the heart of the matter. It reads: 'The prefects of districts are officials in close touch with the people. They are authorized concurrently to administer justice because of their knowledge of the people's conditions and their sympathy with the people's circumstances. However, according to a joint memorial from Chen Neng Shun, Minister of Interior, and Chu Shen, Minister of Justice, the district prefects are stated to have repeatedly practised extortion upon clever pretexts on various occasions in dealing with lawsuits. The reckless imposition of fines such as they have imposed is not only detrimental to the dignity and prestige of the judiciary, but also contrary to their avowed duty and office as protectors of our people. Such practices should be strictly forbidden. Further, the prefects of districts, in handling cases of litigation, should carefully respect our laws; they must not extort money from any lawsuit and thereby disturb and injure the people. The superior officials above them are hereby ordered to exercise timely supervision and, should any abuses, as before mentioned, be discovered and proved, the said superior officials should request us to inflict as severe a punishment as possible in order to pursue our administration and reassure our people.'[8]

Such being the view which the Chinese themselves take of the administration of justice in China, it will be profitable to

[6] Kotenev, Shanghai, Its Mixed Court and Council, p. 187, note.
[7] *Ibid.*
[8] *Ibid.* p. 280, note.

consider a few cases decided in the Chinese Courts, and involving non-protected foreigners. Professor Quigley, in the article already cited, takes an exceedingly optimistic view of their position, and quotes somewhat reassuring observations of the legal adviser of the Soviet Embassy at Peking, and of an anonymous investigator into the condition of Germans.[9] It is unnecessary to consider the remarks of the Soviet adviser seriously. A recent writer of distinction observes forcibly, and with truth: 'Les nations ayont perdue tous leurs privilèges, qu'elles aient été nos ennemies comme l'Allemagne, l'Autriche, la Hongrie, ou alliée infidèle comme la Russie, ont naturellement une situation inférieure. Sans espoir de reconquérir leurs anciens droits, elles n'ont qu'une ressource pour égaliser les chances: obtenir que leurs concurrents renoncent à toute situation spéciale. De plus, l'impérialisme soviétique, plus ardent encore que celui des Tsars, soutient avec ardeur le mouvement chinois dans lequel il voit un moyen d'abord de ruiner les nations "capitalistes et bourgeoises," puis d'atteindre peut-être à la prépondérance en Asie.'[1] These statements are supported by abundant evidence. In China law becomes an incident in the political game. Accordingly, therefore, the Red Russians in China have no cause to complain at the moment, although the Chinese Eastern Railway incident, early in 1926, proved that they, too, could raise their voices in loud protest upon occasion. The White Russians, on the other hand, are freely persecuted in Chinese Courts with the approval, and probably at the instigation, of the Soviet Government.

Few German subjects render themselves liable to accusation of criminal offences, but their experiences in the civil Courts are not reassuring, and they are inclined, wherever possible, to have their cases settled by arbitration out of Court. The two following cases, however, fully reported in the *Peking and Tientsin Times* at the period, sufficiently illustrate what happens when a German comes into conflict with Chinese criminal law as at present administered:—

1. A German doctor, practising in Tientsin, was charged under Chapter XXVI of the Chinese Criminal Code with causing the death of a boy on whom he had operated. The operation was performed under an anaesthetic, properly administered, on June 3, 1922. The boy died on the table through a weakness of

[9] A. J. I. L., January, 1926, p. 65.

[1] Exterritorialite et Interets Etrangers en China, by Morant, 1925, Avant-Propos, p. xv. In May and June, 1926, the Soviet Government sought to obtain the restoration of Russian advisers to Chinese Courts in Manchuria, where its subjects were defendants.

the heart which had not been apparent at his examination. A Chinese coroner examined the boy after death, and declared that the boy died from the anaesthetic, and not from the operation. Nevertheless, a prosecution was instituted, and the doctor was condemned to pay a fine of $2,000 on July 6. He appealed to the higher Provincial Court, which upheld the verdict, and thence to the Supreme Court, which ordered a new trial on December 14, 1922. This took place in the higher Provincial Court in April, 1923. It upheld the previous decision, but reduced the fine by one-half. Again the case went to the Supreme Court, which, on August 9, 1923, once more ordered a fresh trial. The third judgment of the Provincial Court, delivered on May 12, 1924, again condemned the accused to pay a fine of $1,000. On October 27 still another trial was ordered by the Supreme Court, and the case was eventually disposed of on January 21, 1925, by an amnesty of the Chief Executive. Concurrently a civil suit for damages was being heard. This dragged on from June, 1922, to January, 1925. Much of the expert evidence of the German doctor was rejected, although that of the coroner (who was a barber), containing a good deal of nonsense from the judicial point of view, was accepted. No distinction was drawn between the cause of the death and the allocation of the blame, if any. The old Chinese notion of responsibility survived sufficiently to attach the doctor inseparably to the death. Finally, in the hearing in May, 1924, a good deal of important evidence favourable to the accused was deliberately rejected.

2. Another German doctor was charged, under the same section of the criminal code, with causing the death of a female patient. The woman had undergone a successful operation for an internal complaint, and had progressed satisfactorily for seven days, when a friend of her husband called to see her. According to the evidence she had a violent quarrel with this man. As a result her heart collapsed, and, notwithstanding all efforts to save her, she died the following day. In this case the maximum penalty of $2,000 was imposed at successive trials. It has been stated that the verdict against the accused in this case was mainly due to the mistranslation of the evidence of another foreign doctor.[2]

[2] The two following cases are vouched for by Mr. Frank H. B. Harmon, a missionary of the Shantung Christian University, Tsinan. They were contained in a letter to *The Times*, dated December 18, 1925, and published during January, 1926 :

(1) A German proceeding to his office, was struck by a stone thrown by a small boy, who took refuge in a neighbouring house. From a policeman standing by he obtained the name and address of the father, to whom he sent a letter, asking for an apology, on behalf of the son The next day the father

These cases turn mainly on the retention of the old homicide laws, in a modified form, in the new criminal code. The following cases, in the law of contract, vitally affect the foreign trade with China:—

Tientsin is the centre of a large export trade in raw cotton from a wide area in North China. Foreign exporters contract forward, according to custom, in July or August—when the prospects of the year's cotton crop are fairly well known—for delivery from October to December. In 1923 the crop was above the average, and contracts for large quantities were made at taels 23 to taels 28 per picul. The Tokyo earthquake occurred in September, and prices began to soar, eventually touching taels 43 per picul. The Chinese dealers repudiated almost all the forward contracts with foreign exporters to meet the Japanese demand. Appeals to the civil governor, the police commissioner and the Chinese Chamber of Commerce were in vain, and when the foreign merchants sought a remedy in the Courts, the civil governor ruled that forward purchases of cotton constituted an illegal gambling transaction, and nothing was recovered.

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called, saying he had put the matter in the hands of the police. Eight days later the German received a summons to Court. Here he was charged with having thrashed the boy to the point of death. The boy was stripped, and it was certainly evident that he had been badly thrashed. The German asked leave to call a foreign doctor to substantiate his contention that such a beating could not possibly have been given by a stick so small as that carried by him. Permission was refused, on the ground that Chinese doctors, just as good, could be supplied. His case was postponed and the German was locked in a small room which was so filthy that he asked leave to stay in the yard. Permission was granted. After a wait of two hours he was released, on production of guarantors of his future good behaviour. When his case came up again, he produced the policeman as witness, and was released.

The moral of this story seems to be that it is better to be struck by stones than to become entangled with Chinese law.

(2) A small Chinese house with a thatch roof was burned down. Its owner brought an action against the local electric light works, asserting that he himself had seen a ball of fire as big as his arm jump from the electric wires to his roof. The nearest wires were fifteen feet away. The wire, triple-plated, was absolutely intact. A coffin, containing the body of the owner's mother, was slightly charred, and the owner, on the strength of this, asserted that the electricity had burned the house and his mother. The foreign manager, a German, being called, was informed that he was personally responsible for the damage done (the doctrine of responsibility thus seems to survive at the present time). The Manager asserted that it was impossible for a spark to travel fifteen feet, and moreover, the wire was unbroken and in perfect condition. His request to call two foreign experts was refused. The Police Superintendent from the local station had signed a statement that the current was switched off at the time of the fire, but the claimant was allowed to put in a document by another policeman, stating that the current was on, in spite of a statement by the switchman concerned that he had himself pulled out the switch. The case was still *sub iudice* at the time of the letter.

Another similar case deserves brief notice. During the course of a fire at Soochow, in March, 1926, a live wire fell in the burning house, electrocuting a fireman. The local electric light company was held responsible for the man's death, and they were compelled to pay a large sum by way of compensation.

Under the existing system the foreign trader in China (except in places such as Shanghai, where the Mixed Court has a wide jurisdiction) has rarely a real remedy against the Chinese dealer. If there are sharp losses, the dealers quickly disappear, the firm dissolves, and the shareholders cannot be found; or, again, the contract is cancelled, and the foreigner left to the tender mercies of a Court presided over in many cases by a notoriously corrupt official. Under these circumstances the foreign firms often prefer not to risk going to law at all, for even at the present time Chinese law has a nasty habit of rebounding on the head of the unsuccessful litigant. Moreover, the Supreme Court at Peking is openly defied by the provincial tribunals.

Yet another case[3] affords ample evidence of existing evils. William Frederick, a person claiming American citizenship, made a sworn statement before the clerk of the United States Court for China on March 15, 1926. As a consequence of the American Consul-General at Shanghai refusing to recognize his American citizenship, he became subject to Chinese jurisdiction. The statement relates that he was the owner of a family hotel of thirty rooms in the Chapei district, a part of Chinese territory close to the Shanghai International Settlement. The equipment of this place cost $25,000. To popularize it, he obtained a permit from the Chapei Municipality, on the recommendation of the chief of police, to open a dancing pavilion in association with the hotel. The document continues: 'This police chief was succeeded by another, who began persecuting me for money under the guise of licence fees, which he had no right to impose; but he had the might, and made me pay him $100 a month. His interpreter also squeezed me for $50 a month as "loans," and also "borrowed" various groceries and household supplies. Nothing ever was repaid. The chief also saddled upon me two soldiers to whom I had to pay $2 a night[4] for cumbering up the place. They were unnecessary and useless. Night after night the chief and his interpreter came to my place to get free meals and refreshments, sometimes bringing their friends to share in their graft. Then the chief, growing bolder, demanded a loan of taels 500, although I was then paying him and his interpreter almost $200 a month. I refused to give taels 500, and he in turn threatened to close my place. I still refused, as I knew he had no right to extort even the alleged "licence fee"

[3] Reported in the *Shanghai Mercury* during March, 1926, and reprinted in the *Hong Kong Daily Press* of April 2, 1926.

[4] A Chinese soldier, when he is lucky, receives about $15 a month.

which I had been paying to avoid any unpleasantness. Even then I did not realize to its full extent the manner in which the Chinese attitude towards foreigners had changed, due to the deprivation of both Germans and Russians of their extraterritorial rights. The Chinese have learned they can do pretty much as they please with those two nationalities, and the feeling has spread to include all other foreigners as well, as is being demonstrated all over China to-day.'

A few days after his refusal to pay Frederick's hotel was closed by the police. He appealed to General Ho Feng Ling, commanding General of the district, and as a result he was allowed to re-open. To avoid complications with the chief of police, however, he closed the dancing pavilion, together with those entrances leading to it from the hotel. On December 23 a file of police entered the premises and conducted Frederick to the police station 'to see about a new licence.' On arrival he was imprisoned in a room in the servants' quarters, without food or bedding. The following morning he was given a 'hearing' at the police station. 'I was not allowed the advice of counsel; all proceedings were in Chinese, in a dialect of which I knew little or nothing. I was asked to make a statement, which I did in English, refuting the charge that I had permitted gambling in my hotel and allowed prostitutes to reside there. Both these charges were utterly false, and evidently the work of the interpreter to revenge for his loss of "squeeze." I offered to bring witnesses, reputable people who had been and were living in my place from the day it opened. No witnesses were called, but I was hustled out to an automobile and taken to Lunghwa military prison, where I was locked in a cell, together with my "Number one" Chinese servant. . . . All my requests to see my lawyers were refused, nor was I permitted to prepare my case by arranging for witnesses.'

Five days later Frederick was tried in a hay barn, surrounded by fifteen soldiers with fixed bayonets, and then sent back to his cell for another nine days. Through the good offices of a friend an order for his release was procured. 'The moment I was free I started to recover my property. Not only was I refused access to the hotel, but during my stay in gaol my guests had been forced to get out, some without their personal effects. For two years and more I have been trying to recover my property, but without avail. Finally, in desperation, over the need of some private papers, I paid $700 squeeze to gain admission to my bedroom, where I had kept my records in a small safe. Now, mind you, this property had been "officially sealed" by the

Chinese authorities, and kept under guard; but I found the safe broken open, $1,100 in notes and silver gone, the papers scattered over the floor and bearing signs of muddy boots, and, in addition, all my clothing and other easily portable effects had disappeared.'

To his requests for the return of his property, Frederick declares, the officials reply with a request for $20,000, although there is no guarantee that the persecution will cease when it is paid. At the time of making the declaration he was prevented by *force majeure* from occupying the hotel. Nevertheless, the owner was suing him for twenty-two months' back rent.[5]

Cases such as these well illustrate the way in which Chinese law is administered at the present time. They are in no way exceptional. Anyone coming in contact with conditions outside the treaty ports could supply a number of similar ones. It is the existence of conditions such as these which caused Dr. Shurman, United States Minister to China, to declare, at a reception given in his honour by the Chinese General Chamber of Commerce, at Shanghai, on May 22, 1924: 'It is true that China has made a certain progress in judicial reform; certain sets of codes have been promulgated. But, in my opinion, the code is not half so important as the administration of it. It is feared that, in the administration of the law, the foreigner

[5] The following incident, reported in the *South China Morning Post* (Hongkong) of May 18, 1926, deserves notice: 'There was a remarkable scene in the Mixed Court, Shanghai, on the 13th inst., when an order was made that Loo Yung Ming should be handed over to the Chinese authorities for trial. Loo at one time was employed in the office of a foreign lawyer, but recently, it was said, he has been acting as the director of a so-called relief bureau for the stated purpose of distributing rice to poor people. The Chinese alleged that he had falsely represented himself to be an official of the Government, and that he had had made and used what purported to be official seals, though he was (not) vested with the necessary authority. Following upon this verdict, there was a dramatic outburst by the prisoner, who vehemently declaimed that there was no virtue in Chinese law, for those who were supposed to administer it relied only on their own might. Force of arms was the only law these people knew. Violently gesticulating, he begged the Bench to alter their decision, saying that the Chinese authorities had made up their minds to execute him and that he would sooner be shot by the Mixed Court than be turned over to the mercy of his own people. For several minutes the man defied all attempts to remove him from the dock, and eventually he was dragged away by several policemen.' The value of the prisoner's evidence must not be over emphasized (for he seems to have been a little hysterical), but it certainly indicates the attitude of many Chinese who have become habituated to the foreign and 'mixed' jurisdictions of the treaty ports.

Since the organization of the anti-British boycott in Kwangtung, strikers and soldiers have seized and plundered the Canton Hospital, the Stout Memorial Hospital, Wuchow, and the Anglo-Chinese College, Swatow. No compensation has been offered, and since the Canton Government has repeatedly declared frankly that it cannot control the strikers, it is obviously futile for the trustees to seek a legal remedy. If they attempted it, such are the peculiarities of the administration of Chinese law at present that the prosecution, boomerang-like, would probably be turned against them.

would not get the same security as he has to-day.' Another competent American observer, Mr. Charles Denby (formerly in the American diplomatic and consular service in China), wrote in the same year: 'No opinion can be formed in advance as to how well China eventually may meet the views of the Western Powers. Should the matter be up for decision to-day there could be only one verdict from an impartial observer of Chinese legislative and judicial conditions, and that would be that it would be criminal injustice to foreigners in China, and an unfriendly service to China herself, to place foreigners and their property under Chinese law. The fear expressed by Americans who have a stake there is that the conclusion in this matter may not be determined by an impartial observer. So mixed up with altruism, sentimental philanthropy and unsound commercial views is the American attitude towards China, that the interest of those really concerned, the American business men, risk to be sacrificed to home-made considerations of international equity.' [6]

The administration of justice in China has not improved since 1924. For this existing political disturbances are chiefly responsible, since the will to improve present conditions of legal administration has been repeatedly exhibited by China's more enlightened statesmen.[7]

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[6] Extraterritoriality in China, A. J. I. L., 1924, p. 668.

[7] The cases illustrating the administration of Chinese law to-day, mentioned above, together with others of a similar nature, were collected by the present writer, chiefly from contemporary reports of them in the European Press in China. On June 19, 1926, *The China Weekly Review* (Shanghai), published a special number, dealing with extraterritoriality, and containing accounts of the administration of Chinese law in the various provinces. Naturally these accounts vary considerably, both in content and point of view, but certain things re-appear in all of them. On the position of Germans in China since the abolition of their extraterritorial rights, Fritz M. Witkowski (Far Eastern Correspondent of German newspapers) makes the following important observations: 'If the private opinion of the writer, who by means of his extended newspaper work represents a large body of German readers, is of some interest to Americans, he may mention that he himself considers as one of the reasons for the so far satisfying experiences of Germans within Chinese jurisdiction the fact that some of the big Powers still enjoy their extraterritoriality. Firstly, it is for the Chinese a matter of "face-saving" not to give any just cause for complaint. For how can they expect the "first class nations" to give up their rights if this doesn't work with the "second class nations"? Secondly, as shown in the case of Mr. Sherer in Mukden, a German citizen convicted to fifteen years' hard labour by the Chinese and pardoned through the efforts of the extraterritorial consuls of this city, there rests still such a big power with the Treaty Consuls as to prevent any outspoken legal outrage against a citizen of a non-extraterritorial country' (p. 74). In an able article dealing with 'The Courts and the Administration of Justice in Kwangtung Province since the Republic,' Mr. Hin Wong observes that in spite of frequent political disturbances in that province, law reform has been progressive and continuous, but frankly adds: 'The Kwangtung Courts are expected to function regardless of change in civil administration, it being supposed to be more or less independent from politics and other

In an extremely suggestive contribution to the 'American Journal of International Law,' in 1924, Mr. N. Wing Mah, after observing that the recovery by China of her judicial

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influences. In practice, however, they have for a time been allotted only whatever power (is) not usurped by Military or Civil officials existing at the same time' (p. 72). Later, he points out that existing Courts are inadequate in numbers, and that frequent delays have often been the cause of miscarriages of justice. On the other hand, in the highest Courts of the province are men of ability, trained abroad, and a special Board of Indictments has been established to prosecute, and a Court of Impeachment to try, all officials guilty of malpractice or corruption. In conclusion he observes: 'With special attention against further usurpation on the part of executive officials and military power, the Judicial Commission now in Kwangtung should find fewer obstacles to the development and improvement of the power of the judiciary' (p. 76). An American observer, Mr. E. H. Turner, took an encouraging view of the administration of justice in Chekiang, but mentioned that there was a lack of trained lawyers, an absence of public interest in the administration of the law, and an undue severity in many of the penalties. Moreover, the administration of the law, and, more especially, of the criminal law, is circumscribed by the enforcement of martial law throughout the province. This martial law takes cognizance of practically all serious crimes. Frequently an offender is shot without a trial. 'The way out lies in the willingness of military leaders to cease interfering with the regular Courts and co-operate with them by handing the offenders over to them for trial. This will put the administration of justice back on a normal basis, and there will be opportunity then for the Courts to attend to the reforms which they themselves feel ought to have consideration. If this cannot be done the unwillingness of foreigners to have their extraterritorial privileges suspended is not to be wondered at. The foreigner does not want discrimination, but he does want a guaranteed and unimpeachable right to take his troubles to the regular Courts. If Chinese citizens are being robbed of this privilege inherent in democracy, naturally the foreigner does not want to surrender his right to protection by his Government' (pp. 27-28). The writer also suggested that even after extraterritoriality had been abolished there should be special Courts for foreigners. A medical missionary in Shantung wrote: 'I have seen some twenty magistrates in the ten years I have been here, and with one exception they have dispensed justice to the highest bidder. Because this one magistrate tried to render just decisions he was accused and had to leave after five months' (p. 30). From a large city in Shantung another writer reported constant miscarriages of justice. In Huangshien, according to another writer, personal influence is the greatest power which can be secured in all so-called legal matters (p. 30). A correspondent from Chefoo declared that the majority of the Chinese of the place realised their inability to secure justice so long as the militarists ruled, and that most Chinese there would agree that extraterritoriality had been a good thing, 'and that peace can best be maintained by it' (p. 32). In Tsining there are no lawyers, 'so the county magistrate hears the testimony of both sides and then passes judgment. It often takes ten days after action has been taken before the magistrate will hear the accusation. Then after that the case may drag on for months or years. Meanwhile the principals spend much money appealing to the County Governor and the Provincial Governor at Tsinan, and whoever spends the most money gets the decision.' In order to institute a suit, the Court runner must first be feed (p. 83). In Northern Kiangsu things are no better now than they have been for the past 2,000 years. Civil cases are decided 'simply on a financial basis' (p. 84). In criminal cases, prisoners are tortured to confess (p. 85). Execution by cutting slowly to pieces still exists (p. 87). In Wusih (Kiangsu) the torture of prisoners accused of crime still exists (p. 36). In Huchow (Chekiang) something approximately to a modern independent judicial procedure apparently prevails (p. 37). In Hunan, 'no sweeping charges of inefficiency can be made, unless strict adherence to Western methods is demanded, and the Chinese mentality is ignored' (p. 39)—certainly somewhat faint praise, and the writer elsewhere notes that the magistrates are reluctant to render decisions, that slowness and compromise characterize legal procedure, that bribery exists, and that the instability of the Government seriously hampers the administration of justice

sovereignty depends upon herself, and no definite time can be set, makes a number of practical suggestions concerning the successive stages by which the restoration ought to be effected. These include the adoption of adequate codes, the further re-organization of existing Courts, especially those in the vicinity of the treaty ports, the establishment of 'mixed' Courts as an integral part of the judicial system, the appointment of foreign lawyers as Chinese judges, and the progressive relinquishment of extraterritorial rights to correspond with these changes.[8] These suggestions necessarily imply the recovery of political stability in China. When that is achieved, the rest will not be difficult. The independent judicial tradition in China is, however, still a very new thing, and for that reason Mr. N. Wing Mah's suggestion that foreign lawyers should be appointed by the Chinese Government deserves sympathetic consideration. It is one thing to possess a code of laws, and another thing to interpret it in conformity with modern requirements, and the ultimate test of the Chinese codes which have recently been prepared will not be their modernity or theoretical perfection, but the manner in which they lend themselves to scientific exposition in a huge community in which for many years yet

(p. 40). In Fukien, 'the present County Courts of the Republic that have come under the observation of the writer are organized along identical lines with the Courts that existed under the monarchy, only there has been retrogression in their administration due to the disorganized state of affairs' (p. 41). Bribery is exceedingly common. A proposal to establish a 'model Court' failed for the simple reason that a 'model Judge' was undiscoverable (p. 42). In Anhwei there are no formal Courts in the different Hsiens except in the large cities. 'The city magistrates serve consecutively as judges, which system produces much corruption' (p. 45). Judicial torture also exists (p. 50). From North Kwangtung, a foreign missionary, commenting on several observed cases, declares of the decisions that 'it is a question of which party has the greater political influence. It seems as though decisions often depend not so much on the question of principle or of what is right or what should be done, but rather on what is the best policy' (p. 45). In North-Eastern Chihli, 'there is an abundance of justice of the type which seems to suit the Chinese mind; that is, by playing on all possible factors of friendship, kinship, brow-beating, persuasion, etc. The attempt is made to arrive at such a compromise of the case in point as will as reasonably placate both parties, save as much face as possible for all concerned, and release as much cash as possible for those responsible for the happy ending. There is no attempt, nor any thought, of judging the case strictly on its merits, without regard to favour, that is, to secure justice in the strict sense of the term. Neither party expects that, and it is doubtful if they desire it' (pp. 47-48). The above reports represent Chinese law in its daily working, when the Courts are not tricked out to impress the foreigner. Many of the accounts were compiled by missionaries who, as a body, are distinctly sympathetic towards China's aspirations, but whose sympathy does not permit them to ignore the facts of the situation Only in Kwangtung and Chekiang does any attempt seem to have been made (outside Peking and the Treaty Ports) to introduce modern judicial methods, and even here the value of these is extremely limited. Whatever may be the position in the future, no appreciable modification of extraterritoriality is yet possible. (See also the report of the Extraterritoriality Commission.)

[8] Foreign Jurisdiction in China, A. J. I. L., pp. 694—695.

there will be every conceivable type of social and economic life, each with its individual needs in the sphere of law.

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REVIEWS AND NOTICES.

[*Short notices do not necessarily exclude fuller review hereafter.*]

The Old Benchers of the Inner Temple. By Charles Lamb, with annotations by Sir F. D. Mackinnon. Oxford: Clarendon Press. 1927. 4to. xvii and 77 pp. Plates. (21*s.* net.)

Mr. Justice Mackinnon has done an excellent work of piety both for Charles Lamb and for his Inn, and the Clarendon Press has produced it with such perfect craftsmanship and taste as would make it a thing of joy to Lamb himself. There was current error, it seems, to be refuted; a pretty recent editor of Elia's essays supposed those old Benchers to have been for the most part imaginary. Not an excusable supposition, certainly, for a man of letters, but it appears to have escaped censure. The Benchers named by Lamb are neither unreal nor wholly obscure persons. Daines Barrington, perhaps the best known of them, is conspicuous as the addressee of letters which fill a considerable part of White's 'Natural History of Selborne'; he is to be found in Boswell, and is praised by Bentham. Dr. Johnson, again, confirmed the general opinion that Richard Jackson was omniscient, preferring, however (for reasons of reverence, Boswell suggests), to say all-knowing. Baron Maseres (only cursitor baron) was certainly no great lawyer (his expedition to Quebec as Attorney-General—a matter of eleven or twelve weeks to get there in 1766—was not very successful), but he stood well among mathematicians, and earned friendly words from Cobbett and almost a panegyric from Bentham. Joseph Jekyll, also not much of a lawyer, was a noted wit; his epigram on Lord Chatham and Sir Richard Strahan is still remembered; there are slightly differing versions, but we presume Mr. Justice Mackinnon's is authentic. Jekyll had the unique distinction of being forced upon the Court of Chancery as a Master by the Prince Regent's importunity with Lord Eldon—but we will not pick out the learned editor's plum. Salt's fame has been preserved, perhaps embroidered, by Lamb; of him a word anon. So five of Elia's eleven Benchers were already, one way or another, pretty well known.

But why eleven? The essay speaks of twelve. Mr. Justice Mackinnon, who identifies them all, tells us that Richard Twopenny—a rather grotesque figure as described—was never a Bencher. Lamb saw him consorting with Benchers, and fell into a mistake natural enough for a boy whose father, as a servant of the Inn, of course knew better, but had no particular occasion to instruct his son in such things. John Lamb

is the ' Lovel ' of the essay ; a real Lovel was the junior butler of the Inn. Lamb the father was first waiter till his death in 1799, and also Salt's particular servant and (it seems) clerk. Here a just caution is given—Lamb's gift of humorous exaggeration, added to an excess of filial piety, led him to overstep the bounds of plausible fiction. We may believe a Bencher to have been absent-minded, to have said grossly indiscreet things at times by mere distraction, to have forgotten (for example) that a sword went with full dress, and otherwise to have needed frequent jogging from a quick-witted attendant. But, Mr. Justice Mackinnon reminds us, Salt was Under-Treasurer for many years, became in due course Reader (an office no longer active since the middle of the seventeenth century, but still an honour) and then Treasurer, and, moreover, sat in Parliament and was on the Board of the South Sea Company. He could not be so generally incompetent as to hand over all his business ' to his man Lovel ' ; and it is hardly more credible that John Lamb was capable of doing it for him. John Lamb wrote a good hand, as appears by a facsimile, but there is no ground for ascribing more learning to him than enabled him to read and write and cast account. Charles Lamb admits that Salt ' had the reputation of being a very clever man, and of excellent discernment in the chamber practice of the law,' and suggests that he got that reputation merely because he never laughed, surely the lamest of explanations. A still odder extravagance, in the magazine issue of the essay, was identifying Salt with a Mr. S—— whom Lady Mary Wortley Montagu, in a letter inaccurately remembered, set down as a stupid fellow. But Lamb, for once, appears to have perceived the blunder ; at any rate the passage is cancelled in the *Essays of Elia*. For the rest, no devotee of Elia needs to be told that the reader is always expected to supply the proper grains of salt.

In the matter of topography, Mr. Justice Mackinnon, with the aid of excellent prints showing how the Inner Temple looked *temp.* George III, elucidates the question of Lamb's exact birthplace in a building which having two fronts, had and has an upper storey in Fig Tree Court and a lower one in Crown Office Row. Repute speaks for Crown Office Row, and the learned editor, after a little hesitation, is not inclined to contradict it. Finally, Mr. Justice Mackinnon has gone through the text of the essay, and been at the pains of correcting Lamb's usual slips in quotations made from memory. One in the lines from Marvell's ' Garden,' ' *claps* its silver wings ' for *combs*, deforms the original so much that we would fain believe it a misprint. Yet this error has crept into some anthologies. Is it Lamb's after all ?

F. P.

Gedächtnissschrift fur Emil Seckel. Berlin : Springer. 1927. La. 8vo. viii (unnumbered) and 494 pp. (45 Reichm.)

This volume, issued in memory of Emil Seckel, whose early death we deplore, contains a portrait and seven studies, which, as was indeed fitting in view of the range of that distinguished scholar, cover a wide field. It would need another Seckel to deal with them.

Professor Gensmer contributes an edition, the first of two specimens of the little known ' quare ' literature, prefaced by an account of this literature, partly from Seckel's ' Nachlass.' The most important is the

'Quare Bamburgensia' (*quare* is an indeclinable neuter noun), containing 209 'quare.' The method is to cite two propositions in apparent conflict from the texts and to harmonize them in a proposition usually beginning with 'dic.' The doctrine and the few citations lead Seckel and the editor to a date just before or after the end of the 12th century. There are signs of stratification: in general a view not adopted is introduced by such words as 'quidam dicunt,' but here and there a solution is introduced by 'dic' and then rejected and followed by another solution introduced by 'unde dic' or the like (see *Quare*, 76, 102, 145).

The other document which the editor calls 'quare Chisiana' has only twenty-eight questions, more briefly handled and having, in the text, no references to texts or persons. The editor suggests a slightly earlier date and as 'quare' has not yet become a noun (the questions begin 'quaeritur quare') the difference in time may be greater than the editor holds.

Professor Schulz considers the rule 'falsa causa non nocet' in its application to Wills. He points out that the B. G. B. has so far abandoned the principle that it declares any testamentary gift void or voidable which has been actually caused by error. Remarking that this is purely nullifying, he argues, *de lege ferenda*, for a rule which should give effect to the disposition which would have been made had the testator known the facts—the 'irreal' will of the testator. Most of the paper is a careful study of the history of the rule from the classical law through Justinian to the present time, though, as the author is concerned with German law, he says nothing of the French humanists. He shows that classical law held firmly to the rule; the exceptions, nearly always the effect of imperial enactment, being only in a narrow range of striking cases—son supposed to be dead, supposititious child, etc. He notes that in some of these cases effect is given to the 'irreal' will (*e.g.* D. 5. 2. 28) and further that the error is assumed to be the cause—it is 'typische causalität' not 'individuelle.' For Justinian, he holds, the principle was unchanged in *institutio*, but *exheredatio* caused by error was now void, as was a legacy where a *falsa causa* was expressly assigned by error. If all his allegations of interpolation are accepted his conclusion follows, and many of them are convincing. But he is somewhat ready to reject whole blocks of text, though he does here and there recognize the fact that verbal changes are consistent with retention of classical doctrine. To some readers the fact that recent writers have taken exception to particular words is not so convincing as it seems to be to the author. His exegesis is always interesting and usually convincing. But it may be noted (see pp. 107 *et seq.*) that the requirement of the actual word 'filius' in *exheredatio* does not seem to be proved or probable and that the texts in connexion with which this view is stated seem to admit of and indeed to require, a different explanation.

Professor E. Levy studies the effect on marriage of captivity and disappearance, in Roman law. He shows that in classical law both captivity and disappearance without communication, for a considerable time (Verschollenheit), put an end to marriage, while in later law they were (subject to definite time limits) grounds for divorce and remarriage. He connects the change with a change in the conception of marriage, which in classical law is thought of as a relation of fact, like possession (so that *postliminium* does not reintegrate it), while in later law there is a tendency to treat it as a legal relation involving rights and duties, and dissoluble, like any other legal relation, only by taking certain steps. He discusses the

origin of the rules and especially of the time limits found in the legislation of the later empire. In this connexion he considers the canon law of the fifth century and the Syro-Roman lawbook. He finds also what are certainly close analogies and are probably causal factors in Oriental legislations of divers epochs.

Dr. Juncker's paper on Liability and 'Processbegründung' in early Roman law is in effect a discussion of the history and prehistory of *Sacramentum*. His chief theses seem to be that the distinction between delictal liability and that arising from *negotia* is from the beginning fundamental, that the *legis actio sacramento* must not be thought of as resting on a delict to be repressed, that the actual *sacramentum*, bringing in the interest of the State and the notion of 'Säcertät' was the essential and sufficient basis for the founding of a judicial process, that it is therefore an error to think of the *legis actio* as resting on contract, and that the notion of a *condemnatio in rem ipsam* is inadmissible. There are other points. The author's style is far from easy.

The remaining essays deal with more modern questions.

Dr. Hamburger discusses 'Organgesellschaften,' commercial associations of various kinds really controlled by other groups or persons, of which Combines and Kartels are the most striking instances, but which appear in innumerable forms. They present great difficulty and interest from the points of view of juristic analysis, economic import and revenue, and the author seeks to clarify existing notions about the chief types. The work is of interest primarily to German lawyers, but notwithstanding the different conceptions of Association law, Partnership and Agency, it is interesting to English readers.

Dr. W. Grau discusses 'Zusammenhängende Rechtsverhältnisse,' cases in which a given transaction does not really stand alone, but is part of a larger set of relations in which others are concerned. He discusses many such cases, *e.g.* A lets to B a thing which is to be used in a relation between B and C, and C damages it, reinsurance, influence of new taxes on existing relations, and so forth. He finds the law inadequate and argues for what to Anglo-Saxons seems obvious, the relativity of the law, *i.e.* that the law is for the time and not for all time, and must be prepared to accept new points of view and new categories, whatever the past may have to say. He points out, as have others, that while Savigny argued for just this doctrine, he was in fact tying down the law to Roman notions. It is not quite clear whether he is prepared to authorize judges, expressly, to make the necessary changes; he recognizes that to some extent they do it now, and he seems to point to the example of the Supreme Court at Washington.

Dr. R. Grau discusses Art. 48 of the Reichsverfassung, under which the President has, in certain circumstances of urgency, a sort of dictatorship. The content of this has been much discussed and Dr. Grau argues for the view that the powers are not unlimited, and that, except so far as the Article gives him express power to suspend provisions of the Constitution, any rules laid down by him must not conflict with it.

W. W. B.

Prize Law during the World War. By JAMES WILFORD GARNER, Ph.D., LL.D., Professor of Political Science in the University of Illinois. New York: The Macmillan Co. 1927. 8vo. xlviii and 712 pp. (25*s.* net.)

READERS of 'International Law and the World War' will welcome another book from the facile pen of Dr. Garner, and they will not be disappointed, for his latest work is a remarkable contribution to the jurisprudence of prize law. Its scope is ambitious. It surveys the organization and functions of the Prize Courts of the various belligerent countries during the World War, points out their divergencies, and compares their conclusions. Tribunals in Prize exercised jurisdiction in thirteen of the States which came into the war, and these tribunals, Dr. Garner states, delivered at least 1,500 decisions which are reported. The number of unreported decisions must have been enormous. There were over 5,000 decrees in the Prize Court sitting in London alone.

The acts of a national legislative body are of course binding upon all Courts whether such acts are or are not consistent with the law of nations, but so far as the British prize tribunals are concerned the decision of the Judicial Committee in *The Zamora*, [1916] 2 A. C. 77, that in the exercise of its power the Executive cannot violate international law, goes far towards protecting neutrals against arbitrary action. On the Continent, however—except in Belgium where the Prize Council in *The Agiena* followed the English practice—the traditional view would appear to be that the primary allegiance of the Court is to the national law. In comparing the decisions delivered in the several countries one is struck also, as the learned author was struck, by the difference of attitude which our Prize Courts, on the one hand, and those of continental Europe on the other, adopted as regards the processes of interpretation and the form of the judgment. In the decision of a continental judge there is little in the nature of argument or reliance upon precedents, and usually no reference to previous decisions, which indeed are not considered binding; and English lawyers will note with satisfaction that American opinion, as voiced by so eminent a critic as Dr. Garner, pays a tribute to the well-reasoned decisions of the English Prize Courts and notably to those of Sir Samuel Evans, of whom 'it may be said without fear of contradiction that he proved to be a worthy successor of Lord Stowell and that many of his decisions will rank with those of his great predecessor.' Dr. Garner's words are the more pleasing to English ears when one recalls to mind the protests which some of Sir Samuel Evans' judgments evoked in America. In this connexion the author states that there were instances in which cargoes, condemned by the Prize Court, were released upon the demand of interested Governments or compensation made, and he cites the case of *The American Meat Packers' Agreement*. It cannot be too strongly insisted upon, however, that beyond all question, and largely on the authority of American decisions in the Civil War, the packers' cargoes ex the *Kim* and other vessels were rightly condemned, and while no doubt one of the reasons which prompted the settlement was a desire to placate the United States, the main reason was to stop, by agreement, the enormous contraband traffic; and the Chicago packers, on their part, undertook, on the release of a very large percentage of the condemned proceeds, to ship no more produce, directly or indirectly, to persons in any of the countries at war

with Great Britain. No judgment of Sir Samuel Evans has been more discussed than his well-known decision in *The Kim,* the case in which the doctrine of continuous voyage—first applied to unlawful trading and extended to conditional contraband against this country by the Courts of the United States during the Civil War—was thoroughly argued. Sir Samuel Evans said that he had no hesitation in pronouncing that the doctrine 'had become part of the law of nations at the commencement of the war, in accordance with the principles of recognized legal decisions.' The extensions of the doctrine were merely the logical development of existing principles due to the geographical position of Germany and the world-wide character of the conflict. Questions concerning contraband were the subject of a larger number of decisions in Prize than any other, and the author devotes a very substantial portion of his work to this topic which has aroused so much controversy. The lengthy extracts from the cases cited will enable the reader to appreciate the wide extensions of the idea of contraband and how it was that the distinction between conditional and absolute contraband, though never completely abandoned, largely disappeared.

The Reprisals Order in Council will remain a fruitful topic of controversy among International lawyers for years to come. Dr. Garner is of opinion that if the right of retaliation is to be retained its exercise should be subject to the ultimate control of an International Prize Court. Retaliatory Orders, however, are exceptional measures designed to meet exceptional circumstances, and, however strong a case jurists may make out in theory, the experiences of the late war, when the impracticability of the ill-starred Declaration of London and, indeed, of many of the provisions of the Hague Conventions, was clearly demonstrated, should be quite sufficient to prevent this country agreeing to bind itself to the interpretation of a rigid set of rules by an International Prize Court—and particularly rules on the subject of reprisals to which when fighting for its life against an unscrupulous enemy a strict adherence might make the difference between victory and defeat.

The collection of the material for the compilation of this admirable book must have involved an infinity of trouble and research. The greater part of the 700 pages of text are concerned with the decisions of the British Prize tribunals, and it has been left to the professor of a country in which no Prize Courts were established during the Great War to produce the most comprehensive work on the subject that has been brought to our notice. We have, however, one criticism. For the reported decisions of the British Prize tribunals the learned author refers throughout to two collections 'both unofficial and incomplete.' With few exceptions, apart from the decisions of the Colonial and Egyptian Courts, all the important cases are reported both in the Law Reports and in the Law Journal Reports, and it would have been of advantage if reference to these sets of reports had been given. The reports cited are not to be found in many a well-equipped library and cease in 1923, consequently in at least one instance a decision of some importance is cited as 'unreported.'

E. C. M. T.

The Mechanism of the Modern State. By Sir John A. R. Marriott, M.P. Oxford: The Clarendon Press. La. 8vo. Vol. I, xxiii and 596 pp.; Vol. II, xii and 595 pp. (42*s.* net.)

Much of the terminology used by students of the Constitution remains a matter of controversy. The scope of the expression 'Constitutional Law' is far from being settled. It is easy, then, to imagine that the author of the present contribution was faced with a troublesome problem when he came to give his book a title. While it may be admitted that the term 'mechanism' is not very likely to mislead his readers into expecting a discourse on 'mechanistic' theories, some of them may consider that the title does not quite adequately suggest the contents of the book.

The primary purpose of the book, Sir John Marriott tells us, is to set forth the actual working of the English Constitution; and he proceeds to explain that the methods he has adopted are not only analytical and historical, but also comparative. It is hardly necessary to observe that this third method, providing, as it does, valuable aid to a just appreciation of the facts, has not been used hitherto as much as it should. We are sadly in need of a reasonably comprehensive and up-to-date work on comparative constitutional law—a book, that is to say, which analyses constitutions in turn according to certain set principles, so that the reader may look from the description of one constitution to that of another and draw his conclusions. The book before us is not so designed. The comparative method, in so far as a very large proportion of the book is concerned, is used in an occasional manner, but it is liberally used; and this is the feature which chiefly distinguishes the book from its forerunners in the same field.

An introductory Book is followed by Book II (Some Typical Democracies —the City State of Greece, Switzerland, and the United States of America). In this part of the work constitutions are examined in the more strict comparative method. The plan of arrangement would, it seems, have been simplified and a greater homogeneity obtained if the author had seen his way to make the comparative matter in the earlier part more closely related to the investigation of the English Constitution in the main body of the work, viz. Books IV to VIII, dealing with the structure of government (Legislature, and Electorate, Executive, Judiciary, and so on). Part of chapter IV, on Referendal Democracy, it may be suggested, could have found place in chapter XVII, dealing with the Referendum; and similar incorporation made of much of chapter IV, on Presidential Democracy, in various parts of Books IV and V. By means such as these the comparative method could have been used uniformly throughout.

Book III (with the exception of two chapters on Parliamentary Democracy, which are largely historical) deals with Imperial Constitutional History, Law, and Practice. We must confess that some of the chapters of this Book do not appear to us to fall very happily under its heading of Parliamentary Democracy.

Although we may feel inclined to make some reservations regarding the disposition of the first quarter of the book, it is hardly necessary to observe that its contents are expressed in an admirably lucid and easy style.

It is with satisfaction that we find that the first chapter of the Books on the structure of government is headed 'The Separation of Powers.' A consideration of this difficult aspect of constitutional study is a valuable accessary to a detailed investigation of the working of governmental machinery; and the author gives an interesting historical sketch of the evolution of the doctrine. Much confusion has been caused in the past by the failure to distinguish between the separation of powers in the sense of organs of government and the separation of powers in the sense of differentiation or division of functions. It is, perhaps, a pity that the author could not find space for a fuller description of the present position in the English Constitution and for an expression of his views regarding its propriety. The chapter ends rather abruptly with an admission of the principle of the separation of powers.

When Sir John Marriott comes to deal with the structure and procedure of the Legislature, his experience enables him to discuss problems and interpret facts in an informative and authoritative manner. This remark applies with almost equal force to his treatment of the Executive; and under this latter heading we find a welcome twenty-five pages on the Civil Service—a branch of the Executive which too often receives scant notice in works on constitutional law. But, even here, some of the remarks are so succinctly expressed as to be likely to give a misleading impression. The author says, for instance, that in the Civil Service 'there are two dominant principles, amounting in some cases to rules: permanence of tenure (during good behaviour) and abstention from party politics.' This statement might lead the unwary to conclude that in some circumstances at least the civil servant cannot be dismissed at will: whereas, in fact, he can be so dismissed in all cases.

The author must, of course, have experienced considerable difficulty in dealing with a subject of vast range even in 1,200 pages. But we wish that some of the historical matter had been compressed (*e.g.* Vol. II, pp. 141—158), so as to enable the Judiciary in general and the relation of the Judiciary to the Executive in particular to receive more extended treatment. As an example, a summary statement in Vol. II, p. 296, rather suggests that a Petition of Right can be brought against the Crown in respect of tort.

Constitutional law obtains much light and, indeed, authority from the decisions of the Courts. Only three cases of the last hundred years, however, are specifically mentioned in the book; and we are told nothing of the principles laid down or to be gathered from such cases—to take some at random—as *Walker* v. *Baird*, *Chester* v. *Bateson* or *Local Government Board* v. *Arlidge*. The omission of reference to decided cases regarding the privilege of Parliament is, perhaps, capable of explanation. The view may, it is thought, be held that the subject of privilege is nowadays of dormant, if not of obsolescent, interest. On the other hand it was not many years ago that Maitland seized upon parliamentary privilege as a subject the inclusion of which is essential to a work on constitutional law.

Despite the fact that we cannot help regarding the author's treatment of his subject as in some respects disproportionate, we are duly grateful to him for enabling us to share the fruits of a rare combination of experience in public affairs and in the teaching of constitutional history; and there is little doubt that his book will be widely used.

As may be expected with the present publishers, the production of the

book is exemplary and misprints are commendably rare. We have found no more than four—all unimportant. The index, though full, might even be fuller. For instance, the Petition of Right (1628) finds a place, but not the Petition of Right (form of procedure) mentioned in Vol. II, p. 296; and we looked in vain for 'virement,' 'interpellation' and one or two other words.

C. S. E.

The History of Contempt of Court. By Sir John C. Fox, late Senior Master of the Supreme Court, Chancery Division. Oxford: The Clarendon Press. 1927. 8vo. xxiii and 252 pp. (16*s.* net.)

In this scholarly work, Sir John Fox aims not at presenting a treatise on the practice relating to Contempt of Court, but the result of his minute investigation of the modern practice of summary punishment for the offence when committed out of Court. The history of the practice is somewhat curious, being founded, according to Sir John, who furnishes cogent reasons for his conclusion, upon a misconception first entertained and enunciated in the undelivered judgment of Wilmot J. in *R.* v. *Almon*. The whole circumstances of that case are singular. In 1765 a rule *nisi* was obtained by the Crown to attach the defendant, a bookseller, for publishing a libel on Lord Mansfield. Before judgment was delivered it was discovered that by an odd mistake the rule *nisi* had been entitled 'The King *v.* Wilkes,' instead of 'The King *v.* Almon.' Serjeant Glynn, who was counsel for the defendant, was urged 'as a gentleman' to consent to the requisite amendment, but the Serjeant replied that 'as a man of honour' he could not. Another rule was obtained, but the prosecution was dropped in consequence, it was supposed, of the resignation of the then Attorney-General, Sir Fletcher Norton. The elaborate judgment which Wilmot J. had prepared was consequently not delivered, but it was printed in his 'Notes of Opinions and Judgments' published in 1802, as it was thought to contain 'so much legal knowledge on an important subject as to be worthy of being preserved.' Being undelivered, the judgment, if so it can properly be termed, had no binding force, but by approval in subsequent cases it became the leading authority on the subject. It laid down that 'the issuing attachments by the Supreme Courts of Justice in Westminster Hall for contempts out of Court stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the "Lex Terrae" and within the exception of Magna Charta, as the issuing any other legal process whatsoever.' The correctness of this doctrine has been so rarely questioned that it may be said to have become firmly imbedded in the law; it was so treated, for example, by Lord Russell of Killowen C.J. in *R.* v. *Gray* [1900] 2 Q. B. 36 where, founding on Wilmot J.'s opinion, he said that the summary jurisdiction invoked in that case was 'not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part.' After an elaborate examination of the early authorities, the learned author maintains that, so far from Wilmot J.'s view that the practice on this point stands upon immemorial usage, it was 'a new-fangled jurisdiction,' receiving no support from the older cases, which, indeed, showed that contempts out of Court, like other offences, were punishable after trial by a jury, and not by the Court in a

summary way. Much research has been expended in the development of this argument and if, in the future, the whole question of contempt comes to be reconsidered, this work will be found to provide a useful guide to the authorities and a corrective to the assumptions of many of the judges. Attention may also be called to the instructive chapter on 'Amercement and Fine' in which is traced the development of the modern 'fine,' as denoting a pecuniary punishment, from the old procedure 'to make fine.'

J. S. H.

The Case of Sacco and Vanzetti. By FELIX FRANKFURTER. Boston: Little, Brown & Co. 1927. 8vo. pp. 118. (Price, $1.00 net.)

THIS book, by one of the most distinguished of the professors in the Harvard Law School, was published six months before the execution of Sacco and Vanzetti, to make clear to the general public the issues involved in the case. It is written in a scholarly manner, as was only to be expected from the reputation of its author, and every statement is documented. About a third of the book consists of quotations from the evidence.

It would obviously be improper for an English journal to express an opinion upon the justice of an American case, especially when no adequate statement of the prosecution's position has reached this country, but it may safely be said that some of the methods employed by the police before the trial, and many of the questions asked by the district attorney at the trial, would not have been permitted in this country. On page 31 Professor Frankfurter says: 'Moreover, the methods pursued by the police in eliciting identification in this case fatally impair its worth. In England such methods would have discredited the testimony and nullified a verdict based upon it. The recognized procedure is to line up the suspect with others, and so far as possible with individuals of the same race and class, so as not to provoke identification through accentuation. In defiance of these necessary safeguards Sacco and Vanzetti after their arrest were shown singly to persons brought there for the purposes of identification, not as part of a "parade." Moreover, Sacco and Vanzetti were not even allowed to be their natural selves; they were compelled to simulate the behaviour of the Braintree bandits. Under such conditions identification of foreigners is a farce.'

The following is part of the cross-examination of Sacco: '*Q.*—I will raise my voice a little bit. Did you say in substance you could not send your boy to Harvard? *A.*—Yes. *Q.*—Unless you had money. Did you says that? *A.*—Of course. *Q.*—Do you think that is true? *A.*—I think it is. *Q.*—Don't you know Harvard University educates more boys of poor people free than any other University in the United States of America? [The Court having overruled his counsel's objection, Sacco answered.] *A.*—I can't answer that question, no. *Q.*—So without the light of knowledge on that subject, you are condemning even Harvard University, are you, as being a place for rich men? . . .'

It is interesting that Professor Frankfurter, after quoting this and other cross-examination, cites the well-known words of Lord Hewart L.C.J. in

R. v. *Baldwin* (1925) 18 Cr. App. R. 175, 178: 'Counsel for the prosecution should refrain from [such question] for reasons of fairness, because the Crown has no interest whatever in securing a conviction. Its sole interest is to convict the right man.'

Limit of space permits only one further quotation. Professor Frankfurter says: 'Vital to the identification of Sacco and Vanzetti as the murderers was the identification of one of the fatal bullets as a bullet coming from Sacco's pistol.' On this crucial issue Captain Proctor, a firearms expert, testified: '*Q.*—Have you an opinion as to whether bullet No. 3 [exhibit 18] was fired from the Colt automatic, which is in evidence [Sacco's pistol]? *A.*—I have. *Q.*—And what is your opinion? *A.*—My opinion is that it is consistent with being fired from that pistol.'

After the trial Captain Proctor stated in an affidavit: 'I do not intend by that answer to imply that I had found any evidence that the so-called mortal bullet had passed through this particular Colt automatic pistol, and the District Attorney well knew that I did not so intend, and framed his question accordingly. Had I been asked the direct question, whether I had found any affirmative evidence whatever that this so-called mortal bullet had passed through this particular Sacco's pistol, I should have answered then, as I do now without hesitation, in the negative.' It is obvious now that counsel for the defence on cross-examination should have cleared up the ambiguity in Captain Proctor's answer, but from the English standpoint this hardly justifies the prosecution in framing a question and answer which might mislead the jury in the absence of such cross-examination.

Professor Frankfurter's book is an able and powerful argument against the fairness of the trial. It is obvious that there must be an argument on the other side, otherwise the Governor of Massachusetts and his advisory committee would not have taken up the position that they did. It is to be hoped that a book, written with equal clarity and full documentation, will soon be published presenting this other point of view.

The Law, the Advocate, and the Judge. By the Hon. Mr. Justice McCardie. The Solicitors' Law Stationery Society, Ltd. 1927. 8vo. pp. 33. (2*s.* net.)

The legal profession is indebted to the Solicitors' Law Stationery Society for reprinting in this attractive form from *The Solicitors' Journal* Mr. Justice McCardie's Reading, delivered before the Honourable Society of the Middle Temple, on May 19, 1927. In an interesting foreword the Treasurer of the Inn, Mr. Alex. Macmorran, K.C., points out that 'the Office of Reader at the Middle Temple is of great antiquity, going back to a time earlier than any covered by the surviving records of the House.' It is known, however, that elections to the Office were regularly made year by year from 1501 to 1642, when the Civil War caused a break of nineteen years. Renewed after the Restoration, such elections have ever since continued to be made. After 1680, however, the practice of reading publicly in the Hall, which had been incident to the Office, fell into

abeyance. 'The present Reading was delivered to initiate a return to the ancient practice.'

We are not certain that Mr. Justice McCardie has not proved too successful in his Reading, for it will be difficult for future holders of the Office to attain the same standard of interest and charm. In a comparatively few pages he has packed a vast amount of legal learning, subtle analysis, good advice, and wit.

After 'casting a glance at the spacious and significant landscape of the legal times that have gone by,' and giving a list of some of the illustrious members of the Society, which is particularly remarkable for its literary flavour—John Evelyn, William Congreve, Henry Fielding, William Cowper, Richard Brinsley Sheridan, Thomas Moore, Thomas De Quincey, William Makepeace Thackeray, and Charles Dickens—he considers the nature and the virtues of law, which he defines as follows: 'Just as the nation is more than the aggregate of citizens, so the law is, in my view, more than a mere aggregate of statutes and orders and decisions. It is a great unifying and controlling institution, placing upon each his duties, giving to each his right, and enforcing from each his obligations.' To the common law he pays this tribute: 'If this country were to sink to-morrow beneath the waves, the record of the common law of England would stand for ever on the noblest pages of history.'

From the law he passes to the advocate. We cannot resist quoting one story which he relates. 'On the Northern Circuit was a King's Counsel commonly called "Mr. Tom Jones." He was a man of some fulness of style, and one day, when arguing a case before, I think, Chief Justice Cockburn, he developed his argument at considerable length. At last the Chief Justice said: "Mr. Jones, time is passing." Whereupon Mr. Jones replied: "Let it pass, my lord." A little later the Chief Justice said: "Mr. Jones, there are other cases in the list." Mr. Jones replied: "Yes, my lord, there are; but not one save this in which my client takes the slightest interest." '

On the subject of the independence of the judiciary, Mr. Justice McCardie is well qualified to speak, for, if we may say so with all respect, no more impartial and fearless judge than he sits on the Bench to-day. And no judge excels him in fulfilling the obligations (quoted in this Reading) which Lord Justice Fry set for himself when appointed to the Bench—patience, courtesy, and kindliness.

We welcome this Reading as evidence of the developing interest in the theory and history of the law. It has been pointed out frequently that there is at present a renaissance in legal study which is not limited to the theorists. The Bench and Bar have taken their part in this movement, and Mr. Justice McCardie has proved how valuable it is 'for a lawyer to step aside from his settled grooves and his established routine and look broadly' at the law.

Coote's Treatise on the Law of Mortgages. Ninth edition. By R. L. Ramsbotham. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1927. Large 8vo. Two vols. ccxxxiv and 1748 pp. (£4 10*s.* net.)

The eighth edition of this classical work was published in 1912, under the editorship of Mr. S. E. Williams, who then took occasion to effect considerable and well-judged revisions. To Mr. Ramsbotham has fallen the still more responsible task of handing the book on to the profession with the property legislation of 1922-6 incorporated. In our judgment his execution of it compares very favourably with the labours of those post-1925 editors who have undertaken a similar duty in regard to other standard textbooks on the law of property. The ninth edition of *Coote* is fully worthy of its distinguished forerunners.

It may be said with justice that the law of mortgages suffered fewer changes from the passing of the Acts than any other branch of property. The differences are for the most part formal rather than substantive, and they almost all hinge on the substitution of the security of a derivative term of years for that of the mortgagor's freehold interest. It is, we imagine, for this reason that the learned editor has not found it necessary to devote an independent chapter to a summary of the legislative changes, but has contented himself with weaving the new law into the old pattern as occasion arises. This process has been skilfully and economically carried out. Indeed, Mr. Ramsbotham has been able almost exactly to compensate for the additions by the elimination of obsolete matter. Possibly there are times when he has discarded from strength as well as from weakness. Chapter XI, for example, on mortgages of copyholds, and Section II of Chapter LV, on tacking, have been so drastically reduced that their retention hardly serves a useful purpose.

In Chapter XXII (mortgages by limited owners under powers), Section III deals with mortgages under the Settled Land Act. This section includes (iii) mortgages of land settled on trust for sale. Having regard to the emphatic distinction taken since 1925 between settled land and land subject to a trust for sale, we regard this as out of place. It would fall better to be dealt with as an independent section of the following Chapter.

At p. 798, note (f) does not do justice to the wording of section 35 of the Administration of Estates Act, 1925, which departs from that of Locke King's and its amending Acts in a rather curious fashion. At p. 893, section 17 of the Conveyancing Act, 1881, ought to be mentioned in the text. *Evans* v. *Horner* [1925] Ch. 177 is not cited in connection with the rule in *Re Ginger.*

In a work of such authority and completeness we might reasonably have expected an appendix on the Increase of Rent and Mortgage Interest Restriction Acts.

But these are small criticisms which must not detract from our real gratitude to Mr. Ramsbotham and the publishers for an admirable edition.

H. E. S.

The Land Registration Act, 1925, *with the Land Registration Rules*, 1925, *together with Forms of Precedents and Model Registers, etc.* Third edition. By Sir CHARLES FORTESCUE-BRICKDALE, late Chief Registrar of H.M. Land Registry, Barrister-at-law, and JOHN S. STEWART-WALLACE, C.B., Chief Registrar or H.M. Land Registry, Barrister-at-law. London: Stevens & Sons, Ltd. xlii and 823 pp. (£2 10*s.* net.)

THE issue of a third edition of this important work was a necessary consequence of the changes in the law of land tenure and land transfer which were introduced with the coming into operation of the new Conveyancing Acts, 1925. Of these Acts, the Land Registration Act, 1925, has effected the least change as it has only reset the machinery of land registration in conformity or on parallel lines with the substantive requirements of the other Acts, but in course of time, even if it is not the case already, the law and regulations affecting the procedure of the Land Registry may have for all practical purposes the effect of substantive law regulating the conveyancing and transfer of real property in districts where registration has become compulsory. It is claimed for the system of land registration that it simplifies titles and facilitates the transfer of land by removing the obligation under which purchasers, mortgagees, or others dealing for value with land now labour of having to peruse and consider the validity of past transactions, the effect of which has been exhausted. Secondly, it is claimed that the Act relieves purchasers and others from responsibility in regard to subsisting settlements, trusts and equities affecting the title; the methods of transfer and charging are said to be plain and simple, and the Act also guarantees title to purchasers and mortgagees who comply with its provisions. These are remarkable benefits, but they require a large and extremely well conducted Government department to effect them, a bulky volume to explain the system, and not inconsiderable fees, having regard to the simplification of forms and procedure. The contents of the present edition have been written, revised and compiled by two Chief Registrars and represent a code which has grown out of a long experience of practical administration of the Acts. It is, therefore, published under authority which can hardly be questioned.

The scheme of the work is fourfold. The opening chapters contain a general explanation of the process of registering land (compulsorily and voluntarily) under the Land Registration Act, 1925 and of the general effect of registration on title to land; the second part contains valuable notes on the procedure and practice of the office. Part III consists of a dissertation on details of conveyancing practice and Part IV contains the Acts, Rules and Orders with explanations and notes. Numerous appendices include tables of fees, and of precedents in addition to or elaborating the forms prescribed in the Schedule to the Rules. There is an index which has obviously been compiled for practical requirements and appears to be as useful as it is full. It extends to more than a hundred pages. In a work covering the whole range of law relating to a comparatively new method of transfer of land some mistakes and omissions would be almost inevitable, but objection may be made to the unusually long list of addenda which extends over six closely printed pages. The time taken by readers in noting up the interlineations and additions would, in the

aggregate, greatly exceed the time occupied by inserting the matter in its place in the text. The editors anticipate criticism on this point by explaining that a fire destroyed large portions of the type after it had been revised. A more serious objection is that the Law of Property (Amendment) Act, 1926, has received insufficient notice in this book, which was apparently published at least six months after the Act had been passed. In addition to a reference to section 5 of this Act in the Addenda and in a footnote to section 30 of the Land Registration Act, 1925, readers might have expected a precedent or form of the note of an obligation to make a further advance referred to in section 5, and reference to the relative amendments of the later Act would also have been useful in connection with sections of the Law of Property and Settled Land Acts, 1925, which are either set out in full or referred to in the dissertations and notes.

Apart from these objections, the authors may be congratulated on having produced a working and businesslike code which will be invaluable to the large class of practitioners who are concerned with dealings in land where registration is compulsory.

A. S. O.

The Carriage of Goods by Sea Act, 1924. By R. Temperley and John Rowlatt. Third edition. London: Stevens & Sons, Ltd. 1927. xv and 128 pp. (7*s*. 6*d*. net.)

The book opens with a good historical introduction to the events which led to the adoption of the Hague Rules of 1921, and their translation to the statute book by the above-mentioned Act. Prior to this reform the shipping community was apparently strong enough to impose its own terms on charterers and traders alike, and to earn freights with a minimum of responsibility for the goods carried in its ships. The authors warn the reader that the Rules, deceptively simple at first sight, conceal many traps for the unwary, and it must be admitted that, after perusing these Rules and the authors' rather involved explanations, one is left wondering whether it would not have been better after all to leave things alone. From a somewhat tangled discussion in the first chapter of the book it is not at all clear in what cases the Rules and the Act may apply, nor whether the Act 'strikes at documents or transactions,' nor, again, whether there is any application to goods shipped or transhipped at a foreign port of call. The second chapter is a very lucid statement on the effect of the Rules, together with, here and there, a denunciation of their ambiguity or other defects patent enough to cause the reader some amazement. For instance, Article 6 states that, provided no bill of lading is issued, any particular goods may be carried on any agreed terms in cases, *e.g.* where the character of the property . . . or the terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 'Any particular goods' is nowhere defined, as the authors remind us. It certainly seems liable to be interpreted as widely as the word 'contraband' in time of war, and by the simple device of laying down some specially drastic 'terms and conditions' for the carriage of the 'particular' goods,

it will be quite easy for shippers to get out of range of the Rules. Then, just to quote another point, instead of the old implied warranty of seaworthiness, the Rules merely require the carrier to exercise due diligence to make the ship seaworthy; but whereas the old warranty attached at the beginning of every voyage, and of every stage in a voyage, under the new Rules it is most doubtful whether even the lesser duty of exercising diligence applies to any but the initial stage of a trip. One stands aghast at this deplorable result of an attempt at improvement by the mercantile communities concerned. A little forethought was not apparently to be found among their members, and, since 'gouverner c'est prévoir,' this rather discounts the theory of legislation by business men, even when, as in this case, they secure the assistance of the International Law Association. That this body must share the blame is only the result of its very unwise policy of wholesale admissions to membership.

A. C. W.

The Law Relating to Theatres, Music Halls, and other Public Entertainments, including the Law of Musical and Dramatic Copyright. By Sidney C. Isaacs. London: Stevens & Sons, Ltd. 1927. La. 8vo. xxxiii and 448 pp. (£1 net.)

The preface to this book indicates that it is intended for the use of persons connected with the theatre and similar forms of entertainment as well as for that of the legal profession. It is designed to cover all the branches of the law which bear directly or indirectly upon the business of providing theatrical and other entertainments for the public. The author has approached his task with a full appreciation of the difficulties attendant on the production of a book which shall be sufficiently clear and concise to be of practical utility to the layman in the conduct of his business and yet so accurate and complete that it fulfills the requirements of the legal profession. In order to meet the demands of these two classes of readers he has contented himself with a clear but concise statement of the principles involved when dealing with branches of the law which are not peculiar to theatrical enterprise and which are too complex to be dealt with in detail in a book of this size. An example of this method is to be found in the treatment of the Law of Copyright, to which some sixty pages have been devoted. Here the author has wisely refrained from an attempt to cover the whole ground in detail but has contented himself with an admirably clear outline of the law of dramatic and musical copyright as it exists to-day under the Copyright Act, 1911, referring his readers to Copinger on Copyright should they require a fuller treatment of the subject. Throughout the book the same course has been adopted, care being taken however to include references to all cases of special importance to those interested in theatrical enterprises. The chapter dealing with the customs of the theatrical profession and the construction of contracts may be indicated as an example of the thoroughness of the author in collecting and selecting decisions likely to prove useful to those who are called upon to consider the contractual relations of actors and theatrical managements.

The statutes and regulations affecting theatres and places of entertain-

ment and forms of standard contracts are included in appendices. The book is notably well arranged and provided with a good index, and it should, in the words of the Foreword by McCardie J., be of great service not only to the legal profession, but to the theatrical and allied professions also.

I. H.

Archbold's Pleading, Evidence and Practice in Criminal Cases. Twenty-seventh edition. By Robert Ernest Ross. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1927. 8vo. cxiv and 1609 pp. (£2 12*s.* 6*d.* net.)

"Archbold," though now over 100 years of age, still holds an unrivalled position among practitioners. There is, we think, no other great department of the law upon which the lawyer resorts to one living oracle. The last edition was published in 1922, and the learned editor of the present edition (for whose kindly and skilled assistance many practitioners in the Court of Criminal Appeal have been grateful) has been confronted with the task of absorbing into an ever-increasing and very bulky textbook a large body of new legislation and a considerable number of recent authorities. The work has been done in an admirable manner. The new edition contains no more pages than the last, and, owing to the use of a better paper, is actually reduced in bulk by a third. The new authorities have been well assimilated into the text, and a new Appendix sets out the relevant parts of the new legislation. Two useful sections have been added, dealing with the subjects of Dangerous Drugs and Offences under the Vagrancy Acts. The latter class of offences, although of occasional importance to practitioners at quarter sessions, and of great importance to Recorders, have been sought in vain in previous editions. Whether it was right to omit from the new edition the whole of the substantial section on Interference with Public Rights of Passage is more open to doubt. Indictments, however, at common law dealing with these matters are increasingly rare, and the relevant legislation is becoming so large as to necessitate resort to specialised textbooks. But the innovation is a serious one.

A. S. D.

Matrimonial Jurisdiction of Justices. By Albert Lieck and A. C. L. Morrison. London: The Solicitors' Law Stationery Society, Ltd. 1926. 8vo. xxviii and 262 pp. (12*s.* 6*d.*)

This well-printed and handy book has been written by authors, both of whom are chief clerks to London Police Courts. No one could have better presumptive qualifications for literature of this kind, for we know from experience that, while magistrates owe at all times a heavy debt to the clerks of their Courts, there are no cases of greater difficulty than those concerned with matrimonial disputes. Here the advice of an expert officer of the Court is especially valuable to one who may be styled a non-

professional justice of the peace. If the learned authors had published nothing more than their preface, which is full of humanity and common sense, they would have done a considerable service to those who sit on the bench. And the actual text of their work is something much better than a raw mass of legal decisions. It has accurately seized the spirit in which law ought to be administered, instead of showing us a set of by no means well-oiled wheels devised for skinning other people.

This is not the first book which Mr. Lieck and Mr. Morrison have written. We hope that it will not be the last.

P. H. W.

Gibson's Statute Law. Seventh edition. By Arthur Weldon and H. Gibson Rivington. London: The 'Law Notes' Publishing Offices. 1927. Royal 8vo. lxxx and 887 pp. (£2 5*s*. net.)

It cannot be an easy task to select the statutes to be included in a publication of this kind intended primarily for students. To make room for the great bulk of recent legislation on property, a subject of wide and general interest, the authors decided to eliminate from the new edition statutes dealing with special subjects such as Patents, Marine Insurance, etc. This is no doubt the right principle to govern the selection and it has been efficiently carried out. The subject-matter or questions dealt with are arranged alphabetically, and under each heading the statutes are given in their chronological order. The legislative quotations appear to be very full, but what is perhaps a still more valuable feature is the care which has been taken to explain the effects or defects of statutes quoted, the reasons which brought about legislative changes (*e.g.* the quibbling that went on over the ninth section of the Wills Act, 1837), so that the learner passes from the principal to the amending statutes with a sense of the naturalness and reasonableness of things which (though he may lose it as soon as he becomes a practitioner) is, meanwhile, no small help to the study of enactments couched in the forbidding language of parliamentary draughtsmen.

A Table of Cases, a chronological Table of Statutes and a second Table of Statutes by name (alphabetically) and with Sections and lastly an Index, complete a very useful book.

A. C. W.

Consular Privileges and Immunities. By Irvin Stewart, LL.B., Ph.D. New York: Columbia University Press. Large 8vo. 216 pp. (G. $4.)

The Columbia University studies in history, economics and public law (of which this is number 281) are sufficiently well known to require no introduction. In the present volume Dr. Stewart has carefully surveyed the position of consular officers in most modern States, but has not been able to state in general terms the extent to which they are immune from

local jurisdiction. This, however, is not surprising. Not only do the textbook writers differ widely in their view of consular privileges and immunities, but also States themselves regard the consular function very differently. As Dr. Stewart observes: 'At one extreme is England, which has steadily refused to negotiate a single consular convention and which has challenged the existence of certain privileges based upon custom; at the other is France, which has negotiated a large number of such treaties, and has been ready to extend broad privileges even in the absence of treaty stipulations. Between the two positions fall the other States, their practice being far from uniform.' It will therefore be obvious that the only true method of approach to this somewhat intricate question is the comparative, and this method Dr. Stewart has carefully followed throughout his thesis. The result is an exceedingly useful digest of consular usage, to which are attached a full bibliography and an index. One important point which Dr. Stewart makes clear in the course of his discussion is that until fairly recent times a group of States (including Great Britain and the United States) questioned the existence of any consular privileges at all, apart from treaties. Accordingly, in 1856, the American Attorney-General, Mr. Cushing, while denying that consuls were public ministers, enjoying the right of exterritoriality, found it necessary to affirm that 'consuls do unquestionably enjoy certain privileges of exemption from local and political obligation,' and the *Consular Regulations* of the United States shortly afterwards adopted this view. Only twenty years before, however, Attorney-General Butler had enunciated a view which seems extremely strange to the modern lawyer: 'After a careful consideration of this subject, I am of opinion that foreign consuls in the United States are entitled to no immunities beyond those enjoyed by persons coming to this country in a private capacity from foreign nations, except that of being sued and prosecuted exclusively in the United States Courts, under the jurisdiction conferred on them by the Constitution and laws of the United States.' The whole question of consular function might well be submitted to a committee of international lawyers, working in association with the League, and a uniform set of rules might be gradually adopted by States. Meanwhile, however, Dr. Stewart's volume remains an excellent guide to the existing and slightly obscure position of consular officers.

G. W. K.

Shanghai: Its Mixed Court and Council. By A. M. Kotenev. Shanghai: 'North China Daily News and Herald.' Large 8vo. xxvi and 589 pp. (Mex. $20.)

The literature of extraterritoriality, especially that devoted to foreign rights in China, becomes bulkier from year to year, but Mr. Kotenev in this substantial volume breaks new ground, in that he confines himself exclusively to the problem of jurisdiction within the limits of the international settlement at Shanghai. Again, the volume has nothing to say of consular jurisdiction within that area, but of the jurisdiction exercised over Chinese and unprotected foreigners by what used to be called the 'Mixed Court' but which is now known as the Provisional Court. Only

the first three hundred pages deal with the history of the Court. The rest contains a series of documents, setting forth the rules of procedure, and the laws enforced at the Mixed Court. The latter are the new codes, recently translated into English by the Chinese Commission on Extraterritoriality at Peking, but which (it is interesting to note) have only been consistently enforced at the Supreme Court at Peking, and at the Mixed Court at Shanghai. The usefulness of such an informative volume as this at the present time, when foreign rights in China are suffering considerable modification, can scarcely be exaggerated, but the volume in its present form has two serious defects as a work of reference. The material from which the historical section has been compiled seems to be almost entirely the records of the Mixed Court, supplemented by occasional references to standard works dealing with foreign interests in China. The British and Foreign State Papers relating to China last century, as well as those of the United States, periodically contain lengthy despatches explaining and criticizing the growth and position of the Mixed Court; and these might have been used extensively with advantage. The second defect (a common one in foreign publications on China) is that no effort has been made to secure material illustrating the Chinese view of the growth of the jurisdiction of the Mixed Court. That this is of the very first importance is proved by the recent change in status of the Court, as a result of determined Chinese effort.

G. W. K.

Books also received:—

Powers of Attorney: Manual on the Law and Practice. Issued by the Council of the Chartered Institute of Secretaries. Cambridge: W. Heffer & Sons, Ltd. 1927. viii and 85 pp. (3*s.* 6*d.* net.).—This little manual, which does not of course claim to be exhaustive, is a concise statement of the law, systematically presented in its different parts, after the manner of well-thought-out textbooks for students. Elements are first dealt with, viz. the nature of the instrument, the parties, the form and attestation; then the principles of interpretation, the special provisions of the recent Law of Property Acts, ratification and, lastly, the standard clauses to be found in current instruments. Some very useful appendices give the material passages of leading decisions, rules of Court, statutory enactments, etc. In short, it states the law concisely, systematically and clearly. It cannot do more. The author (Mr. H. M. Cohen, of Messrs. Linklaters & Paines, the solicitors for the Institute) and the other persons responsible for the publication are to be congratulated on having produced a book which will be invaluable for all students who, whether for legal or commercial careers, are required to obtain a sound basic knowledge of the subject. A. C. W.

The Law and Practice of Bankruptcy. Third edition. By G. L. Hardy. London: Effingham Wilson. 1927. xv and 266 pp. (Price, 4*s.* net.).—The book justifies the author's hope of producing a convenient and inexpensive guide to the law on the subject, sufficiently full for all practical purposes. Beyond that point reference must be made to the larger volumes and authorities. The present edition, which was rendered

necessary by the Bankruptcy (Amendment) Act of 1926, does not depart from the excellent plan adopted in the earlier editions, and rationally shows, side by side with the old law, the changes made by the latest Act. In each chapter, and under each heading, all important points are clearly dealt with in separate paragraphs, and the same efficient method of presentment is used whenever the wording of any particular section of the Acts requires dissection. So far as style is concerned, the author judiciously uses his own words to state or explain the law, and it is refreshing to find a writer who has not fallen a victim to the somewhat too prevalent habit of explaining a statute by the mere servile quotation of the text. His book is all the clearer for it, and deserves every commendation as a medium-sized publication on the subject. A. C. W.

The Land Registry General Map. By W. S. Tratman, Deputy Chief Surveyor, H.M. Land Registry, with a foreword by the Chief Land Registrar. London: Butterworth & Co. 8vo. xi and 94 pp. (5*s.* net.)—This is a little book on a great subject which appears to have escaped the attention of lawyers, textwriters and others, as the literature relating to it is almost non-existent except in the blue book reports of long-forgotten Royal Commissions. So accustomed are we to take an invention or method of proved utility for granted that it comes almost as a matter of surprise to find that the principle of mapping and reference to maps in the practice of land registration had many opponents and was not established until several Royal Commissions had weighed reasons for and against. Mr. Tratman gives an interesting description and history of mapping in his Department, and it is clear that the work which goes on quietly and as required from day to day in filling up and modifying the outlines of the Ordnance Map according to the reports of the Registry surveyors has a geographical as well as legal importance.

The general map now in use in H.M. Land Registry is the outcome of many years' experience and experiments. Admitting that the outlined boundaries in maps of private property cannot be conclusive evidence of ownership apart from agreement between the owners on either side, it would be difficult to devise any plan which would be more simple and satisfactory than that adopted. A very large scale map is prepared, as far as possible from the ordnance survey. On this map the plots or parcels of land are numbered for reference and a parcels index is provided. This index, in its turn gives the clue to all the titles, cautions or notices or other matter affecting the rights to each of the parcels on the map. Mr. Tratman provides a reduced facsimile of the Land Registry General Map and Parcels Index. The Appendices deal with the advantages of registration, tables of costs, and a specimen register of a London title to land. There is an adequate index.

Mr. Tratman's book possesses an interest which should attract many readers beyond the circle of the conveyancing profession, to whom especially its contents cannot fail to prove very useful if not indispensable now that the information contained in its pages has become accessible.

A. S. O.

A Practical Guide to the Land Charges Act, 1925. By A. H. Cosway. London: Effingham Wilson. vii and 109 pp. (4*s.* net.)—This is a useful explanation, in simple form, of the Land Charges Act, 1925, and Rules

made in pursuance thereof which now have an important bearing on the subject of charges and incumbrances on land. In addition the author has collected the references to the Land Charges Act, 1925, in the Law of Property and Settled Land Acts of 1925, and the Law of Property (Amendment) Act, 1926. The fees charged and the forms in use at the Land Registry are set out in two appendices, and there is an index to the text of the book.

The Story of the Falkland Islands: A Study in Legal and Diplomatic History. By JULIUS GOEBEL, Jr., LL.B., Ph.D., Associate in Law, Columbia University. New Haven: Yale University Press. 1927. La. 8vo. xiii and 482 pp. (23*s.* net.)

Odgers on the Common Law of England. Third edition. By ROLAND BURROWS, M.A., LL.D., Reader in Evidence, Precedure and Criminal Law in the Inns of Court, assisted by R. A. B. POWELL, J. ALAN BELL, H. A. STREET and C. M. CAHN, Barristers-at-law. Two vols. London: Sweet & Maxwell, Ltd. 1927. La. 8vo. lxxix and 751, cvi and 935 pp. (£2 10*s.* net.)

A History of the English Courts. By A. T. CARTER, C.B.E., K.C., being a fifth edition of 'A History of English Legal Institutions.' London: Butterworth & Co. 1927. 8vo. viii and 183 pp. (15*s.* net.)

The Growth of Criminal Law in Ancient Greece. By GEORGE M. CALHOUN. Berkeley, California: University of California Press. London: Cambridge University Press. 1927. 8vo. 149 pp. (15*s.* net.)

The Conduct of Medical Practice. By the Editor of 'The Lancet' and expert collaborators. London: 'The Lancet.' 1927. 8vo. xv and 332 pp. (10*s.* 6*d.*)

Medical Insurance Examination: Modern Methods and Rating of Lives. By J. PATERSON MACLAREN, M.A., B.Sc., M.B., C.M. London: Baillière Tindall & Cox. 1927. 8vo. xii and 312 pp. (16*s.* net.)

The Principles of the Law of Contracts and Torts, with a short outline of the Law of Evidence, being Indermaur's Common Law re-written and enlarged by A. M. WILSHERE, M.A., LL.B., of Gray's Inn, Barrister-at-law. Second Edition. London: Sweet & Maxwell, Ltd. 1927. lvi and 754 pp. (30*s.* net.)

Thomas and Bellot's Leading Cases in Constitutional Law. Sixth edition. By HUGH H. L. BELLOT, M.A., D.C.L. London: Sweet & Maxwell, Ltd. 1927. 8vo. xxxviii and 367 pp.

The Legacy of Israel. Essays by Sir GEORGE ADAM SMITH, EDWYN BEVAN, F. C. BURKITT, and others. Planned by the late I. ABRAHAMS, and edited by EDWYN R. BEVAN and CHARLES SINGER. With an Introduction by the Master of Balliol. Oxford: At the Clarendon Press. 1927. 8vo. xxxvii and 551 pp. (10*s.* net.)

Recent Revelations of European Diplomacy. By G. P. Gooch, D.Litt., F.B.A. London: Longmans, Green & Co., Ltd. 1927. 8vo. vi and 218 pp. (7*s.* 6*d.* net.)

Kerr on the Law and Practice of Injunctions. Sixth edition. By J. M. Paterson, of the Middle Temple, Barrister-at-law. London: Sweet & Maxwell, Ltd. 1927. La. 8vo. lxiv and 743 pp. (£2 5*s.* net.)

Calendar of the Close Rolls preserved in the Public Record Office. Prepared under the superintendence of the Deputy Keeper of the Records. Henry IV, Vol. I, A.D. 1399—1402. London: H.M. Stationery Office. 1927. La. 8vo. 597 pp. (£1 17*s.* 6*d.* net.)

Administrative Justice and the Supremacy of Law in the United States. By John Dickinson. Cambridge (Mass.): Harvard University Press. London: Humphrey Milford. 1927. La. 8vo. 403 pp. (23*s.* net.)

The Criminal Justice Acts, with Explanatory Notes. By A. Lieck and A. C. L. Morrison. Second edition. London: Stevens & Sons, Ltd. 1927. 8vo. xxxix and 344 pp. (12*s.* 6*d.*)

The Ottoman Land Laws, with a Commentary on the Ottoman Land Code of 7th Ramadan, 1274. By R. C. Tute, President of the Land Court, Jerusalem. Jerusalem: Greek Conv. Press. London: Stevens & Sons, Ltd. La. 8vo. 207 pp. (£1.)

Law in the Making. By Carleton Kemp Allen. Oxford. At the Clarendon Press. 1927. 8vo. xxiii and 388 pp. (21*s.* net.

La Critique du Témoignage. Par François Gorphe. Deuxième édition. Paris: Librarie Dalloz. 1927. La. 8vo. 470 pp. (40 fr.)

Small Holdings and Allotments Acts, 1908-1926. By Aubrey John Spencer. Third edition. London: Stevens & Sons, Ltd. 1927. 8vo. xix and 356 pp. (12*s.* 6*d.* net.)

Wolstenholme and Cherry's Conveyancing Statutes, etc. Eleventh edition. By Sir B. L. Cherry, John Chadwick and D. Hughes Parry. Vol. II. London: Stevens & Sons, Ltd. 1927. La. 8vo. civ and 1167 pp. (Two vols., £4 net.)

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